TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 393

JAMES DUNN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1931

CERTIORARI GRANTED NOVEMBER 2, 1931

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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Attorneys for Appellee:

GEO. J. HATFIELD, Esq., U. S. Attorney.

ALBERT E. SHEETS, Esq., Asst. U. S. Attorney.

In the Northern Division of the United States District Court for the Northern District of California.

No. 4718.

INDICTMENT.

FIRST COUNT.

(Nuisance; 27 U. S. C., Sec. 33.)

In the April, 1930, term of said Division, the Grand Jurors thereof upon their oaths, present: THAT

JAMES DUNN

(hereinafter called "said accused"), on the 4th day of July, 1930, at a place known as No. 301–2d Street, in the City of Eureka, County of Humboldt, within said Division, did then and there knowingly and wilfully maintain a common nuisance, in then and there knowingly and wilfully committing a pro-

hibited and unlawful act of keeping for sale at said place certain intoxicating liquor fit for use for beverage purposes, to wit: five drinks of whiskey and one drink of beer containing more than one-half of one per cent alcohol by volume.

SECOND COUNT.

(Possession; 27 U. S. C., sec. 12.)

And the said Grand Jurors, upon their oaths, do further present: That the said accused then and there knowingly and wilfully committed a prohibited and unlawful act of possession of the said certain intoxicating liquor.

THIRD COUNT.

(Sale; 27 U. S. C. sec. 12.)

And the said Grand Jurors, upon their oaths, do further present: That the said accused, on the 26th day of June, 1930, at the said place, did then and there knowingly and wilfully commit a prohibited and unlawful act of sale of certain intoxicating liquor fit for beverage purposes, to wit: five drinks of whiskey and one drink of beer.

GEO. J. HATFIELD,
United States Attorney.
ALBERT E. SHEETS,
Asst. United States Attorney.

[Endorsed]: A true bill. R. B. Carlton, Foreman. Filed Jul. 16, 1930. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [1*]

*Page-number appearing at the foot of page of original certified Transcript of Record.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Monday, the 21st day of July, in the year of our Lord one thousand nine hundred and 30. Present: the Honorable A. F. ST. SURE, District Judge.

No. 4718.

UNITED STATES

vs.

JAMES DUNN.

MINUTES OF COURT—JULY 21, 1930—ARRAIGNMENT AND PLEA.

The defendant being present with E. S. Selvage, Esq., his attorney, was duly arraigned, waived reading of the indictment, and thereupon plead Not Guilty. ORDERED this case set for July 22, 1930, for trial. [2]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Eureka, on Wednesday, the 23d day of July, in the year of our Lord one thousand nine hundred and 30. Present: the Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—JULY 23, 1930—TRIAL.

This case came on this day for trial. The defendant was present with C. A. Russell and E. S. Selvage, Esqrs., his attorneys. A. E. Sheets, Asst. U. S. Attorney, was present on behalf of the United States. Thereupon the following jurors, viz.:

1. Arthur E. Cartwright
2. L. L. Bryan
3. Daniel McClure
4. Robert Maclean
5. Neil McLeod
6. Nicolay C. Bonniksen
7. Harvey Littlefield
8. H. A. Graham
9. Joseph M. Walker
10. Hubert Alexander Baldwin
11. Henry F. Brizard
12. Emil H. Jensen

twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Sheets made a statement to the Court and jury in behalf of the United States. R. C. Osborne and C. Beam were sworn and testified on behalf of the United States and the United States rested. Mr. Russell made a motion to instruct the jury to return a verdict of Not Guilty, which said motion was ordered denied and defendant allowed an exception to the

ruling of the Court. Mr. Russell made a statement to the Court and jury on behalf of the defendant. James Dunn and Mrs. Florence Classen were sworn and testified on behalf of the defendant. ORDERED that the further trial hereof be continued until 10 A. M. to-morrow and the jury, after being admonished by the Court, were excused until that time. [3]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Thursday, the 24th day of July, in the year of our Lord one thousand nine hundred and 30. Present: the Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—JULY 24, 1930—TRIAL (RESUMED).

The defendant, the attorneys and the jury impaneled herein being present as heretofore the trial hereof was thereupon resumed. Mrs. Florence Classen was recalled and Joe Dunn, Clarence Cralle and Robert Shields were sworn and testified on behalf of the defendant. Defendant introduced in evidence and filed its exhibit marked "A." Edward C. Harkins was sworn and R. C. Osborne was recalled and testified on behalf of the United States in rebuttal and the evidence was closed. Mr. Russell made a motion to instruct the jury to

return a verdict of not guilty, which said motion was ordered and denied and the defendant allowed an exception to the ruling of the Court. After argument by the attorneys and the instruction of the Court to the jury, the jury at 2:18 P. M. retired to deliberate upon their verdict. At 4:35 P. M. the jury returned into court and being asked if they had agreed upon their verdict, replied in the affirmative and returned the following verdict, which was ordered recorded, viz.:

"We, the Jury, find James Dunn, the defendant at the bar, Guilty on First Count, Not Guilty on Second Count, Not Guilty on Third Count.

HENRY F. BRIZARD,
Foreman."

and the jury being asked if said verdict as recorded is their verdict, each juror replied that it is. ORDERED that the jury be discharged from further consideration thereof. ORDERED that this case be continued to July 25th, 1930, for judgment and that the defendant be remanded in the custody of the United States Marshal and that a mittimus issue herein. [4]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Friday, the 25th day of July, in the year of our Lord one thousand nine hundred and 30. Present: the Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—JULY 25, 1930—SENTENCE.

The defendant being present with E. S. Selvage, Esq., his attorney. A. E. Sheets, Asst. U. S. Attorney, was present for the United States. Defendant made a motion to set aside verdict; motion for a new trial and motion in arrest of judgment. After hearing had, IT IS ORDERED that said motions be denied. Defendant was thereupon called for judgment. ORDERED that the defendant be imprisoned for the period of One (1) Year in the County Jail, Contra Costa County, California, and that he pay a fine in the sum of Five Hundred ($500.00) Dollars. FURTHER ORDERED that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged by due course of law. [5]

[Title of Court and Cause.]

VERDICT.

We, the jury, find James Dunn, the defendant at the bar,

Guilty on First Count.
Not Guilty on Second Count.
Not Guilty on Third Count.

HENRY F. BRIZARD,
Foreman.

[Endorsed]: Filed July 24, 1930, at 4 o'clock and 35 minutes P. M. [6]

In the Northern Division of the United States District Court, for the Northern District of California.

No. 4718.

THE UNITED STATES OF AMERICA

vs.

JAMES DUNN.

JUDGMENT ON VERDICT OF GUILTY.

Convicted Viol. Jones-Stalker Act.

The Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 16th day of July, 1930, charging him with the crime of Viol. Jones-Stalker Act; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 24th day of July, 1930, to wit:

"We, the Jury, find James Dunn, the defendant at the bar, Guilty on First Count, Not Guilty on Second Count, Not Guilty on Third Count.

HENRY F. BRIZARD,
Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or ap-

pearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT, WHEREAS, the said JAMES DUNN having been duly convicted in this court of the crime of viol. Jones-Stalker Act,—

IT IS THEREFORE ORDERED AND ADJUDGED that the said defendant be imprisoned for the period of One (1) Year in the County Jail, Contra Costa County, California, and that he pay a fine in the sum of Five Hundred ($500.00) Dollars; further ordered that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged by due course of law.

Judgment entered this 25th day of July, 1930.

WALTER B. MALING,
Clerk.

By F. M. Lampert,
Deputy Clerk. [7]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Now comes James Dunn, defendant in the above-entitled cause, and by Eugene S. Selvage, Esq., one of his attorneys, moves the Court to grant a new trial of said cause, and for reasons therefor, shows to the Court the following:

1. That the verdict in said cause is contrary to law.

2. That the verdict in said cause was not supported by the evidence in the case.

3. That the evidence in said cause is insufficient to justify said verdict.

4. That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

5. Newly discovered evidence, material to the defendant, which he could not, with reasonable diligence have discovered, and produced at the trial. That attached is an affidavit in support of this ground for a new trial.

Dated at Eureka, California, this 30th day of July, 1930.

JAMES DUNN,
Defendant.

EUGENE S. SELVAGE,
CLIFFORD RUSSELL,
Attorneys for Defendant. [8]

Service of the within motion for a new trial is hereby admitted this 4th day of Aug., 1930.

GEO. J. HATFIELD,
United States Attorney. [9]

[Title of Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL.

State of California,
County of Humboldt,—ss.

Joe Dunn, being first duly sworn, deposes and says:

That he is the brother of James Dunn, the defendant in the above-entitled action; that for approximately one year last past he has been and is now working for James Dunn, in his place of business at No. 301, Second Street, City of Eureka, California.

That your affiant goes to work at noon of each day and works until three o'clock P. M.; he then has time off and returns again to work at six o'clock P. M., and works until midnight of each day.

That James Dunn usually goes to work around eight o'clock A. M. and works until noon. He then remains off until three o'clock, at which time he returns to work and remains at the place from three o'clock to six o'clock P. M., during the time which affiant has off.

That Charles Granger does the janitor work in the place and he goes to work about six o'clock each morning and works until about eight o'clock A. M.; he then is off until about two o'clock, returns and works until three o'clock P. M.; that he does the cleaning up the janitor work about the place. [10]

That Walter Kuchan also works in the place; that he usually goes to work in the afternoon of each day and works until five o'clock P. M. He then takes one hour off for dinner, returning at six o'clock P. M., after which he works until midnight of each day.

That on the 26th day of June, 1930, Joe Dunn, Walter Kuchan and Charles Granger were the only persons working in the premises; that Charles Granger went to work about six o'clock A. M. and worked until noon; he then was off until three o'clock in the afternoon, at which time he returned and worked until five o'clock P. M., at which time he quit for the day.

That your affiant went to work on June 26th, 1930, about eight o'clock A. M., and worked until three o'clock P. M., at which time he left to eat and did not return until about five o'clock P. M., and that thereafter he worked until twelve o'clock midnight.

That Walter Kuchan on June 26th, 1930, was working during his regular working hours as aforesaid.

That your affiant is six feet tall, weighs one hundred and ninety-four pounds, has dark hair and eyebrows, has no teeth missing in the front of his mouth, has grey eyes, smooth shaven, age forty-seven years, white race.

That Charles Granger is five feet six inches tall, weighs one hundred and eighty-five pounds, has grey hair and eyebrows, has false teeth but no teeth missing, brown eyes, has grey mustache, age seventy-two years, white race.

That Walter Kuchan is five feet eight inches tall, weighs between one hundred and forty and one hundred and forty-five pounds, dark hair, no teeth missing, brown eyes, smooth shaven, age between forty and forty-five years, white race.

JOE DUNN.

Subscribed and sworn to before me this 31st day of July, 1930.

_____,

Notary Public in and for the County of Humboldt, State of California. [11]

[Endorsed]: Filed Aug. 4, 1930. [12]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT.

Now comes the defendant James Dunn, and respectfully moves this Court to arrest and withhold judgment in the above-entitled cause and moves that the verdict of conviction of said defendant heretofore given and made in the said cause be vacated and set aside and declared to be null and void for each of the following reasons:

I.

That the verdict is contrary to law in that the evidence was confined solely to a sale at one time with no evidence of other violations or habitual sales, and likewise with no evidence from which such acts may reasonably be deducted. Therefore

the penalty provided in the Act for unlawful sale would alone apply.

That the section penalizing as a nuisance the maintaining of premises on which liquor is sold, implies a continuity of action and not a single sale.

II.

That the verdict convicting the defendant of maintaining a nuisance and acquitting him of possession and sale is inconsistent, cannot be reconciled and cannot stand for the following reasons, to wit: The testimony of the Government was to the effect that defendant made a sale of six drinks to two Government agents on June 26, 1930. Of this sale the jury found the defendant not guilty. There was no evidence of any other sale by [13] any other person whomsoever, and there was no evidence that any liquor other than the six drinks was ever sold or kept on said premises.

That by finding said defendant not guilty of said sale and not guilty of said possession the jury cannot as a matter of law find defendant guilty of nuisance.

III.

That Count No. One of the Indictment on file herein does not present, state or charge facts sufficient to constitute a public offense under the laws of the United States against this defendant.

WHEREFORE, by reason of the premises the defendant prays this Honorable Court that judgment be withheld and the conviction of the defendant be declared null and void.

Dated at Eureka, California, July 31st, 1930.

JAMES DUNN,
Defendant.

EUGENE S. SELVAGE,
CLIFFORD RUSSELL,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 4, 1930. [14]

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 16th day of July, 1930, the grand jury of the Northern Division of the Northern District of California returned an indictment charging defendant with violations of the Jones-Stalker Act and did present in the First Count that James Dunn, said defendant, on the 4th day of July, 1930, at a place known as No. 301 Second Street, in the City of Eureka, County of Humboldt, within said Division, did then and there knowingly and wilfully maintain a common nuisance, in then and there knowingly and wilfully committing a prohibited and unlawful act of keeping for sale at said place certain intoxicating liquor fit for beverage purposes, to wit: five drinks of whiskey and one drink of beer containing more than one-half of one per cent alcohol by volume and by Second Count as contained in said indictment did further present that said defendant then and there knowingly and wilfully committed a pro-

hibited and unlawful act of possession of said certain intoxicating liquor and by Third Count presented that the defendant on the 26th day of June, 1930, at the said place, did then and there knowingly and wilfully commit a prohibited and unlawful act of sale of certain intoxicating liquor fit for beverage purposes, to wit, five drinks of whiskey and one drink of beer.

That on the 21st day of July, 1930, the said James Dunn appeared in court and upon being called to plead to said indictment, pleaded [15] Not Guilty as shown by the records herein.

That thereafter the cause came on regularly for trial on the 23d day of July, 1930, at the hour of 2 o'clock P. M. before the Honorable A. F. St. Sure, District Judge of said court, and a jury duly and regularly impaneled and sworn, the United States being represented by Albert E. Sheets, Esq., Assistant United States Attorney and the defendant being represented by Clifford A. Russell, Esq. and Eugene S. Selvage, Esq. The opening statement having been made by counsel for the Government, the following proceedings, and none other, were had, and the following evidence, both oral and documentary, and none other, was received, to wit:

GOVERNMENT'S CASE.

TESTIMONY OF R. C. OSBORNE, FOR THE GOVERNMENT.

Thereupon R. C. OSBORNE was called and sworn as a witness on behalf of the Government, and testified as follows:

(Testimony of R. C. Osborne.)

Direct Examination.

(By Mr. SHEETS.)

I am a Federal Prohibition Officer. About 7:30 o'clock P. M. on the 26th day of June, 1930, in company with Federal Prohibition Agent Beam and two unknown men I visited premises No. 301 Second Street in the City of Eureka, California. These premises consist of a room fronting on Second Street containing fishing-tackle, sporting goods, cigars and soft drinks for sale with a larger room to the rear containing pool-tables with a bar to the right. At this particular time I passed through the room containing the fishing-tackle in company with Agent Beam and two other men and saw the defendant standing in the rear room back of the bar. We walked in there and the man that was transient he said, "Hello Jim."

We ordered three whiskeys and one beer, which the defendant served to the four of us. [16]

Q. Have you any doubt about this being the man who served the drinks? A. No.

I am able to tell whiskey by the taste and know that the drink he served me was whiskey. I paid one dollar ($1.00) for the four drinks to the defendant. A few minutes later Agent Beam, for fifty cents ($.50) purchased two more drinks. He drank one of these drinks and one of the other men with us drank the other one. The sale of the six drinks was made by defendant to us within the space of a few minutes.

(Testimony of R. C. Osborne.)

I do not know whether the liquor was served from a bottle, pitcher or container.

Cross-examination.

(By Mr. RUSSELL.)

I have been a prohibition agent since March 11, 1930. From my notes, which I made shortly after I left the place, I observed that the man who sold us the six drinks was five feet nine inches in height, 185 pounds in weight, 50 years of age, with dark hair and eyes, of the white race, was smooth shaven, and had a missing tooth in his upper jaw near the front.

Q. Would you tell me what in your opinion is the weight of the defendant? Would you stand up, please, Mr. Dunn?

A. Well, he looks to me now as if he weighs more than 185 pounds.

Q. Would you say the defendant as he stands there weighs 210 pounds or more?

A. I was so told by him that he did.

Q. When did he tell you that? On July 4th.

Q. That is the day he was arrested? A. Yes.

Q. In other words, he was not arrested when you say he made these sales on June 26th? A. No.

Q. As to his height what would you estimate his height at present. [17]

A. I would estimate his height at 5–10.

Q. Would you say his height was more than 5–10½? A. I could not say.

(Testimony of R. C. Osborne.)

Mr. RUSSELL.—Q. What would you say is the color of this man's hair?

A. Dark, turning gray.

The COURT.—Would you speak up.

A. It is dark, turning gray.

Mr. RUSSELL.—Q. Would you call that more dark?

A. Yes.

Q. Now is there any tooth missing in his upper jaw? A. I cannot say.

Q. You saw him this morning, did you not, Mr. Osborne, in Mr. Hatfield's office? A. Yes.

Q. Was there any tooth missing?

A. There was no tooth missing, there is an open space.

Q. But there is no tooth missing? A. No.

The COURT.—You say there is no tooth missing but there is an open space?

A. Between his teeth.

Mr. RUSSELL.—Might we ask at this time that Mr. Osborn point out what he calls the open space in Mr. Dunn's upper jaw?

The COURT.—Yes.

Mr. RUSSELL.—Just expose your teeth, and just state what you see, Mr. Osborne.

A. There.

Mr. RUSSELL.—For the sake of the record you refer to a space which you say exists on the right side of the upper jaw there between two teeth?

A. Yes, sir.

(Testimony of R. C. Osborne.)

Mr. SHEETS.—Would the defendant just draw aside his lips so that that might be clear. [18]

Mr. RUSSELL.—Yes.

Q. But as the defendant is now and as he was this morning there was no tooth missing from his head that you noticed? A. Not to my knowledge. I observe there is a space between two of his teeth but he has no missing tooth. We were in the place about ten minutes. I never talked to defendant except to order a drink. Nothing else was said. The defendant never talked to me. So far as I can recollect I never saw the defendant before. Prior to going into these premises I had four drinks of whiskey, two drinks of rum and two drinks of wine, making eight drinks in all. I next saw the defendant on July 4, 1930, at which time he was arrested.

Q. Is it not true that on the 4th of July you went in there and Mr. Dunn's brother was in there and Mr. Dunn came in there later on? A. No.

Q. Mr. Dunn was in there when you went in on the 4th of July? A. Yes.

Q. You are sure of that? A. Yes.

Q. Didn't you when you went in on the 4th of July look at Mr. Dunn's brother's teeth to see if there was a missing tooth? A. In that place?

Q. Yes. A. No.

Q. You did not look at them? A. No.

Redirect Examination.

(By Mr. SHEETS.)

I have been in the Government Service for

(Testimony of R. C. Osborne.)

twenty-five years and in the Prohibition Service since March 11, 1930.

The following particular questions and answers were given:

Mr. SHEETS.—Q. With reference to those eight drinks that you had, do you adopt any method to prevent yourself from becoming intoxicated, from liquor which you have to consume in the course of your duty? [19]

Mr. RUSSELL.—Objected to as leading and suggestive.

The COURT.—Overruled.

Mr. RUSSELL.—Exception.

A. Yes, I do.

Mr. SHEETS.—Q. Did you in this instance?

A. Yes.

Q. What?

Mr. RUSSELL.—Same objection, if your Honor please.

The COURT.—Overruled.

Mr. RUSSELL.—Exception.

A. I put my finger down in my throat and bring it up.

Mr. SHEETS.—Q. Had you done that this evening?

A. Yes.

Q. When? A. I did it in Jim Dunn's place.

Q. Whereabouts? A. In the toilet.

Q. Were you sober?

A. I think I was, I don't know.

Q. Have you now any doubt about it?

(Testimony of R. C. Osborne.)

Mr. RUSSELL.—We object to that as cross-examination of his own witness.

The COURT.—Overruled.

Mr. RUSSELL.—Exception.

A. I don't think that I could be absolutely sober with those drinks of liquor.

Mr. SHEETS.—Q. Did you know what was going on?

A. Yes.

Q. You had full possession of your faculties?

A. Yes.

Mr. RUSSELL.—We again object to that as leading and suggestive.

The COURT.—Overruled.

Mr. RUSSELL.—Note an exception. [20]

TESTIMONY OF C. BEAM, FOR THE GOVERNMENT.

C. BEAM was called and sworn as a witness on behalf of the Government, and testified as follows:

Direct Examination.

(By Mr. SHEETS.)

I am a Federal Prohibition Officer. On the 26th day of June, 1930, in company with Prohibition Officer Osborne and two unknown men, I visited premises No. 301 Second Street in the City of Eureka. The premises looked to be a cigar-store in front with some fishing-tackle in the south window. Immediately behind there is a room with pool-tables and a bar. There is a partition divid-

(Testimony of C. Beam.)

ing the two rooms probably twelve feet from the sidewalk. When we walked in one of the pick-ups said, "Hello, Jim," and we immediately walked up to the bar, ordered four drinks, for which Agent Osborne paid defendant twenty-five cents a drink. I purchased two drinks of whiskey about five minutes after Agent Osborne bought his drinks for which I paid twenty-five cents a drink. I did not observe the defendant serve any other drinks to anyone. I did not notice what he did with the money as we immediately left the building.

Q. What did he serve the drinks in?

A. He served them in one ounce whiskey glasses.

Q. What did he serve them out of?

A. I could not tell; he got them underneath the bar some place.

Q. Was it amber colored liquor or white?

A. Amber colored.

Q. Was it jackass or bourbon?

A. Rotten jackass.

Q. You say rotten jackass?

A. Rotten is right.

Q. You then went away?

A. I never came back.

Q. I say you went away from there? A. Yes.

Q. You never went back?

A. I never went back. [21]

Cross-examination.

(By Mr. RUSSELL.)

Mr. RUSSELL.—Q. How many drinks did you have on that evening?

(Testimony of C. Beam.)

A. I had eight drinks.

Q. Did you have the same as Mr. Osborne, four drinks of jackass brandy, two of rum and two of wine? A. That is right.

Q. Before you went in the place?

A. That is right.

Q. That did not affect you in any way?

A. Well, I was not sober in a way.

Q. Now, when Mr. Dunn as you say took the money for the first drink from Mr. Osborne, where did he put it?

A. He rang it up on the cash register.

Q. What sort of a cash register?

A. I never paid any attention to what kind it was.

Q. Where was it located?

A. About the middle of the back of the bar.

Q. You said in answer to a question of Mr. Sheets' that you did not see Mr. Dunn serve any more drinks after the first drink that was brought by Mr. Osborne, and then later on you said he served two drinks to you. When you say you did not see him serve any more drinks, what did you mean? A. To anybody else.

Q. Excluding those that were served to you, is that it? A. Yes.

In my notes which I made shortly after I left the place I made the following description of the man who sold us the drinks, viz.: He was 50 years of age, white race, five feet nine inches in height, weighed about 185 pounds, dark hair and eyes,

(Testimony of C. Beam.)

medium build, upper tooth missing on the right side. I observed to-day that the defendant has no missing tooth. He has an open space between two of his teeth. [22]

Mr. RUSSELL.—Q. Although you observed him closely that evening?

A. Just only a glance.

Q. How long were you in there?

A. Five or ten minutes.

Q. During the entire five or ten minutes you just took one glance at him? A. One glance.

STIPULATION AS TO OWNERSHIP OF PREMISES.

It was stipulated by counsel for the respective parties that James Dunn is and on June 26th, 1930, was the owner of the premises designated as No. 301 Second Street in the city of Eureka, County of Humboldt, State of California.

The Government thereupon rested its case.

EXCEPTION No. 1.

Thereupon counsel for defendant moved for an instructed verdict on the ground that the evidence was insufficient to show that defendant on the 4th day of July, 1930, maintained a or any common nuisance as presented in the First Count of said Indictment. This motion was made on the further ground there was no evidence whatsoever that any liquor was kept for sale on said premises on the 4th day of July, 1930, as alleged in the Indictment.

The only evidence being that on the 26th day of June, 1930, a different date than set forth in the Indictment, the two agents purchased six drinks of liquor from the defendant.

The Court first denied the motion for the instructed verdict, and then advised that counsel may later renew the motion.

To which ruling of the Court the defendant then and there duly and regularly excepted, and still excepts and here designates as "Exception No. 1." [23]

DEFENDANT'S CASE.

TESTIMONY OF JAMES DUNN, FOR DEFENDANT.

Thereupon JAMES DUNN was called and sworn as a witness on his own behalf, and testified as follows:

Direct Examination.

(By Mr. RUSSELL.)

I am the defendant in this case. I own the premises known as 301 Second Street in the City of Eureka, California. On the 26th day of June, 1930, I was not in these premises until some time between 8 and 8:30 in the evening. During the day I was at my ranch at Blocksburg, Humboldt County, California. I was not in these premises at 7:30 o'clock on that evening and did not see either Mr. Osborne or Mr. Beam on that night or at any other time, so far as I know, until July 4th, 1930, at which time I saw Mr. Osborne. I did not sell Mr. Osborne, Mr.

(Testimony of James Dunn.)

Beam or the two men they mentioned the six drinks of liquor or any drinks of liquor whatsoever.

Cross-examination.

(By Mr. SHEETS.)

Q. Did you see Mr. Osborne before you were in your place of business?

A. Yes, I met him up the street.

Q. With whom was he? A. Marshal Burke.

Q. When you went to your place of business was Mr. Osborne in there? A. No.

Q. Did he come in there and find you in there?

A. Yes.

Mr. Osborne on July 4, 1930, at the time of my arrest looked in my mouth to see if I had a missing tooth.

On June 26th, 1930, I had been out to my place in the hills which is situated about seventy-six miles from Eureka and I did not return until about 8 o'clock in the evening. At that time I went to my place of business and shortly thereafter changed my clothes. [24] I saw my brother and the man who works in the place when I went in there. Mrs. Classen and her baby child were with me on the trip.

Mr. SHEETS.—Let me see if I understand you: Promptly on returning from your place in the hills you went to 301–2nd Street?

A. Yes.

Q. You did not go first and change your clothes?

A. No.

(Testimony of James Dunn.)

Q. Did anybody see you besides your brother at that time and Mrs. Classen?

A. I am quite sure they did.

Q. Do you recall anybody who did?

A. Yes, I do.

Q. Will you tell me the names now?

A. Yes, a man named R. T. Herron, I believe his name is; I can't recall any others; there were quite a few people in my place.

Q. Just prior to 8 o'clock were you in the presence of anyone except Mrs. Classen?

A. I cannot say that I was.

Q. You don't know the name of any other person who saw you preceding 8 o'clock, for how long?

A. I do not.

Q. For how long, or how many hours?

A. I was all day on this trip.

Q. You were all day in the presence of Mrs. Classen, and did any other person see you during that time? A. Yes, four people at my ranch.

Q. Who saw you?

A. Parker for one and Johnson another.

Q. When was the last hour before 8 o'clock he saw you?

A. It takes me four hours to drive in from there.

Q. Will you listen to the question: What was the last hour before 8 o'clock that Johnson saw you out on your ranch?

A. Four o'clock in the afternoon.

Q. And that was out at your ranch 76 miles away?

A. Yes, sir.

(Testimony of James Dunn.)

Q. Is that when you left your ranch? A. Yes.

Q. Johnson saw you then and who else saw you?

A. Parker [25]

Q. Who else? A. My boy.

Q. How old is he? A. He is 17 years of age.

Q. Anyone else? A. Another boy there.

Q. Who? A. His name is Nevers.

Q. How old is he?

A. He is about between 15 and 17.

Q. Is he living on your place?

A. He is on a vacation out there with my boy.

Q. Did Johnson work for you?

A. He is staying on the place out there doing odd chores.

Q. How long has he been there?

A. Since about last February.

Q. Who is the other man you named?

A. Parker.

Q. Does he work for you? A. Yes.

Q. How long has he worked for you?

A. Four years.

Q. Your boy and this other boy whose name is what— A. Fred Nevers.

Q. Does he live at your place? A. No.

Q. What was he doing out there?

A. He was on his vacation with my boy, a schoolboy; they were out there in the hills.

Q. Was there anybody else saw you?

A. Yes, I was over to the neighbors.

Q. At that same time? A. Yes.

Q. What neighbors?

(Testimony of James Dunn.)

A. His name, I believe, is Al Dane.

Q. You saw him about 3 or 3:30?

A. Some time during the day, I don't remember the time.

Q. Did you see him in the morning or afternoon?

A. I saw him in the afternoon.

Q. Shortly before you left or quite a while before you left? A. Shortly before I left.

Q. Who else of your neighbors? A. His wife.

Q. Who else? A. That is about all, I guess. [26]

Q. You have named now all the persons that you saw or who saw you before you left the ranch, is that right? A. Yes.

From the time I left the ranch until I reached Eureka at about 8 o'clock in the evening I was in the company of Mrs. Classen and her infant child.

Q. How old is the child?

A. Between 3 and 4 years old.

Q. Do you see Mr. Osborne standing over there by the door? A. Yes.

Q. That is the man who on July 4th came in your place after you had been placed under arrest and examined your mouth? A. Yes.

Q. You are positive of that? A. Yes.

Q. Do you see this gentleman standing here whose name is Harkins? A. Yes.

Q. As a matter of fact do you not know that Mr. Harkins was the man who on the night of July 4th examined your mouth?

A. He did when I first came in there. He did

(Testimony of James Dunn.)

when I first came in there, when I first gave myself up.

Q. Do you not know that as a matter of fact he is the man that examined your mouth?

A. No, I do not.

Q. Who was present at that time?

A. There was a man named Clarence Cralle, a man named Arthur Ferrera, my brother and this gentleman here and the other prohibition agents with him.

Q. This other prohibition agent?

A. No, Osborne was not there when I first went in my place.

Q. Who was present when Osborne was there?

A. This agent here and the man that was with him, and Mr. Burke and Mr. Osborne and the people in the house; they would not let anyone out.

Q. There were four Government officers there at the time Osborne examined your mouth? A. Yes.

Q. They were Mr. Burke and this gentleman, Mr. Harkins? A. Yes. [27]

Q. And Mr. Osborne and still another one whose name you don't know? A. Yes.

Q. You are positive that Mr. Osborne at that time was present and examined your mouth?

A. Yes.

Q. How long have you run that place?

Mr. RUSSELL.—That is objected to as immaterial and not proper cross-examination.

The COURT.—Overruled.

Mr. RUSSELL.—Note an exception.

(Testimony of James Dunn.)

A. It must be at least 10 years.

Mr. SHEETS.—Q. Do you have a cigar-store in the back? A. No.

Q. Do you have one in front? A. Yes.

Q. What do you have in back there?

A. Where do you mean, in back?

Q. In back of where this bar is.

A. In back of my cigar-store?

Q. Where the bar is?

A. I have two pool-tables there with four card-tables and soft drinks of all kinds.

Q. Do you sell ice-cream. A. No.

Q. Do you sell sandwiches? A. No.

Q. It is not possible to get lunch of any kind?

A. No.

Q. Do you have whiskey glasses in there?

A. Yes.

Q. What for? A. To serve bitters.

Q. You serve bitters? A. Yes.

Q. Is that all you serve in these whiskey glasses?

A. Yes.

Q. Who works for you at the bar?

Mr. RUSSELL.—Object to that as not proper cross-examination.

The COURT.—Overruled.

Mr. RUSSELL.—Note an exception.

A. My brother.

Mr. SHEETS.—Q. Is he the only man works behind your bar?

A. Yes. There is a man in the front, there are two men that I have there. [28]

(Testimony of James Dunn.)

Q. Is that a bar?

A. It is a counter, I guess. I don't know whether you call it counter or bar.

Q. Are drinks sold there? A. Yes.

Q. Drinks are also sold in front? A. Yes.

Q. Who serves drinks there?

A. Well, I have two different men there, one in the morning and one in the evening.

Q. What kind of drinks are sold out in the front?

A. I have milk-shakes, soda of all kinds, root beer, near-beer.

Q. But you keep this other bar for bitters and for other kinds of soft drinks and ice-cream?

A. To wait on my customers in back.

In the back room I have a counter or bar, two pool-tables, four card-tables and soft drinks of all kinds. I sell milk-shakes, soda and near-beer.

The counter or bar in the back is used to wait on my customers in the back.

Joe Dunn, my brother, works in the place. I also have two other men working there.

The Court then adjourned until Thursday, July 24, 1930, at 10 o'clock A. M.

On Thursday, July 24, 1930, at 10 o'clock, Mrs. FLORENCE CLASSEN was called as a witness on behalf of the defendant and testified as follows:

TESTIMONY OF MRS. FLORENCE CLASSEN, FOR DEFENDANT.

Direct Examination.

(By Mr. SELVAGE.)

I reside at 305 Second Street in the city of

(Testimony of Mrs. Florence Classen.)

Eureka, California. I know James Dunn and took a trip with him to his ranch on June 26, 1930. We started at 8 to 8:30 o'clock in the morning and traveled in his truck. It took us about four hours to go to his place. My baby of six years was with us. No one else. We remained at the [29] ranch a couple of hours and then returned to Eureka, arriving around 8 o'clock in the evening. After our arrival Mr. Dunn put the truck in the garage back of his place and then went into his premises and remained a few minutes. He then came out and we went to eat in the Splendid Cafe, where we remained until about 9 o'clock. I then returned to my home and put my child to bed. Mr. Dunn again went into his place of business and then came upstairs about a half hour later.

Cross-examination.

(By Mr. SHEETS.)

I am and since the year 1926 have been the housekeeper for James Dunn.

We left for his ranch between 8 and 8:30 o'clock in the morning. I know it was about that hour because Mr. Dunn went to the butcher-shop before leaving. This shop does not open until 8 o'clock in the morning. We arrived at the ranch about 12:30 P. M. We left the ranch to come home about 4 o'clock, arriving in Eureka around 8 o'clock. It takes about four hours to come in.

Mr. SHEETS.—Q. Now, that is nearly a month ago?

A. Yes.

(Testimony of Mrs. Florence Classen.)

Q. How do you fix the 26th of June as the day you went out to the ranch?

A. The evening of the 4th after Mr. Dunn had been arrested he came upstairs and he was talking about being arrested and I said, "That's too bad," and he said—

Q. (Interrupting.) Just a minute; how do you fix the time, yourself, independently, of the 26th, by your memory, not by what someone told you—how do you fix the time?

A. That is rather an embarrassing question to have to answer but if I have to I will.

Q. It is very important for me to know how you fix the date. Of course I do not wish to embarrass you but it is very important to know how any witnesses who testify positively as to a date fix the time when an alibi is the issue. [30]

A. Well, I will answer then. I was not feeling well on that date, and I am positive of that date.

Q. Did you see any people out there at the ranch?

A. I did.

Q. Who did you see?

A. Mr. Parker, Mr. Johnson and a neighbor.

Q. What was the neighbor's name?

A. Mr. Dane.

Q. Did you see Mrs. Dane?

A. No, I did not. Mr. Dane was over to the ranch and Mr. Dunn's son was there and a little boy by the name of Fred.

Q. Was Mrs. Dane over there?

A. No, she was not.

(Testimony of Mrs. Florence Classen.)

Q. Was Mr. Dunn at the ranch all that day?

A. Yes, he was at the ranch.

Q. He did not leave the ranch while you were there? A. No, he did not.

TESTIMONY OF JOE DUNN, FOR DEFENDANT.

Thereupon JOE DUNN was called and sworn as a witness on behalf of the defendant and testified as follows:

Direct Examination.

(By Mr. RUSSELL.)

I am a brother of James Dunn, the defendant. On the 26th day of June, 1930, I was employed at No. 301 Second Street, Eureka, California, and had been there employed for over a year. I generally worked each day from noon to 3 o'clock in the afternoon and from 6 in the evening to midnight. James Dunn, my brother, also worked from time to time in the premises. Generally he opened up about 8 o'clock in the morning and worked until I came at noon. He would later return and work from 3 to 6, the hours I had off. James Dunn never worked after 6 o'clock at night. [31]

On the 26th day of June, 1930, James Dunn was not working in the place. He was there a short time in the evening. I do not know the exact time but would judge it was between 7 and 8 o'clock. He did not work at any time behind the bar that evening. I was personally there from 6 o'clock

(Testimony of Joe Dunn.)

until midnight on June 26, 1930. I did not see either Mr. Beam or Mr. Osborne on that night and did not serve them any drinks whatsoever.

Thereupon a photograph of the front of the cigar and sporting goods store of James Dunn was identified by the witness and duly introduced in evidence as Defendant's Exhibit "A."

I was in the premises on the evening of July 4th at the time my brother was arrested. I saw Mr. Osborne there at that time. I do not believe Mr. Beam was there. One of the agents with a straw hat asked me if I had any tooth missing when he read the warrant to me. The warrant for John Doe was read by him to me first and I was first placed under arrest under this warrant.

Q. Now then, subsequently, did your brother come in, that is your brother came in?

A. Yes, he came in later.

Q. After he came in later, at any time when he was there, did any of the agents force him to open his mouth and show whether or not he had a missing tooth?

The COURT.—Force?

Mr. RUSSELL.—Compel him—I will put it, command him to open his mouth?

A. No, nobody commanded him.

The COURT.—Tell just what happened.

A. He came in while the agents were there and he said, "I guess I am the man you are looking for," and the agent said he would have to hold the both of us until the man came to identify us.

(Testimony of Joe Dunn.)

Mr. RUSSELL.—Q. Now then, did a man later on come in and identify either one of you? A. Yes.

Q. Was that Mr. Osborne? A. Yes. [32]

Q. What happened when Mr. Osborne came in?

A. He came in and Jim said, "I guess this warrant is for me, but I have no teeth missing."

Q. What else happened?

A. Then he came over and looked at me and then went back to Jim and said, "This is the man."

Cross-examination.

(By Mr. SHEETS.)

It was some time between 6 and 7 o'clock on July 4th when these officers made the arrest. It might have been, however, a little later.

My brother was in the premises on June 26, 1930, after he came in from the ranch. I would judge he was there some time between 7 and 8 o'clock. I was in charge of the place at that time.

When he comes in from the ranch my brother sometimes brings with him turkeys, chickens and berries. When he arrives with the truck he generally blows the horn and I go out and open the gate for him. When I am out of the place the man in the front of the cigar-store takes charge. I remember that he went to the country on June 26th because that is pay-day. When he is here he generally cashes the checks for the different fellows who come in from the lumber companies. He cashes at that time a number of checks.

When we read the warrant of arrest we observed that it referred to June 26th.

(Testimony of Joe Dunn.)

Q. How does that help you to refresh your memory, what connection has it, the fact that you cashed these checks on that night?

A. Otherwise I do not cash them. If he is there he cashes the checks.

Q. But he was not there during any evening in June, you said?

A. He is there every evening, but not working.

Q. If he is in town he is around there every evening? [33]

A. Yes, he is in and out.

Q. But when he is out during the evening, when he is in and out, that is part of the time, you cash the checks. Do you hear what I asked you?

A. Yes.

Q. When he is out during any evening in June you cash checks, don't you?

A. Well, yes. If he is in town he generally cashed them, probably 10 or 15 or 20 checks are cashed on pay-day.

Q. But he was there during part of the evening, wasn't he?

A. He came in from the ranch, yes, he came in and looked at the mail.

Q. He was there again, too, wasn't he?

A. Yes.

Q. Later on that evening?

A. After he had had his supper.

Q. Did he cash some checks? A. No, sir.

Q. He never cashed any checks that evening?

A. I don't think he did.

(Testimony of Joe Dunn.)

Q. How do you recall that it was that evening when the checks came in?

A. Well, I remember of cashing checks and it must have been or he would have done it.

Q. But here you are on the 24th of July and you are looking back to the 26th of June and you are testifying about where he was and place him. How does the fact that you cashed checks help you to remember, and how would you remember you cashed checks?

A. Naturally if you are busy cashing checks and serving people at the same time you notice that.

Q. On the 4th of July, looking back 10 days before that, does that help you to remember that?

A. You naturally look back if you are arrested or something like that.

Q. Wouldn't you be busy most any evening? [34]

A. Well, not like pay-day; you are not so busy; more money changes hands on pay-day.

Q. It is pay-day for who?

A. For the men that work at the camps and mills.

The COURT.—How many checks did you cash on that day?

A. I should say in the neighborhood of 12 or 15 or 18, probably 20 checks.

Mr. SHEETS.—Q. Mr. Dunn, look at Mr. Harkins and see if you remember seeing him before?

A. Yes, I saw him on the evening of the 4th of July.

Q. In 301—2nd Street.

(Testimony of Joe Dunn.)

Q. In that place of business? A. Yes.

Q. Did he look at you?

A. No, he stood over by the door keeping people from going out.

Q. Did he look at your brother when he came in?

A. Well, he spoke to him, yes.

Q. Did he look at his mouth?

A. No, I don't think he did.

Q. Do you remember seeing him there?

A. Oh, yes.

Q. And you remember distinctly that Mr. Osborne, who just went out of the courtroom as you started to testify, was the man who was in the place and actually looked at your and your brother's mouth? A. Yes.

Q. Are you sure of that? A. Yes.

TESTIMONY OF CLARENCE CRALLE, FOR DEFENDANT.

Thereupon CLARENCE CRALLE, was called and sworn as a witness on behalf of the defendant and testified as follows:

Direct Examination.

(By Mr. RUSSELL.)

I live in Eureka and am a barber by trade. On the evening of [35] July 4, 1930, I was in premises No. 301 Second Street. At that time I observed some prohibition agents came into the place. James Dunn was not there at that time but Joe Dunn was. The Government agent served the

(Testimony of Clarence Cralle.)

warrant on Joe Dunn the first thing and then read it to him. Later the agents asked me to open my mouth.

Cross-examination.

(By Mr. SHEETS.)

I have not seen the man around here that served the warrant; he had a white hat on, a panama hat, and this gentleman, referring to Mr. Harkins, was with him. One of the men asked me if I was a brother of James Dunn and he said, "Let me see your teeth," as I was going out, and James Dunn said, "No, he is not a brother of mine."

TESTIMONY OF ROBERT L. SHIELDS, FOR DEFENDANT.

Thereupon ROBERT L. SHIELDS was called and sworn as a witness on behalf of defendant and testified as follows:

Direct Examination.

(By Mr. RUSSELL.)

I am a contractor by occupation. I know James Dunn and his brother Joe Dunn. I was in James Dunn's place of business on the evening of July 4, 1930. I saw Mr. Osborne in that place of business on that evening. When he came in Mr. James Dunn was sitting on the corner of a pool-table. Joe Dunn was standing by the side of this pool-table. Mr. Osborne came in and passed in front of James Dunn and looked at Joe Dunn and then turned around

(Testimony of Robert L. Shields.)

and said, "We will take him," referring to James Dunn.

Cross-examination.

(By Mr. SHEETS.)

I have never been in a place that was raided prior to that occasion. I walked in just after the excitement was over. At the door there was a heavy-set fellow who is the marshal and there was [36] another fellow talking to Mr. Dunn when I walked in. Mr. Osborne was the man that walked over and said, "We will take Jim Dunn." The man on the other side, who was talking to Mr. Dunn and the marshal when I went in, he was the fellow that told me the short fellow was the marshal.

Mr. RUSSELL.—This little short fellow, Mr. Burke, is the one that you refer to as the marshal?

A. No, that does not look like the man that was with him when I went in. There was a fellow with him, a smaller fellow than this fellow here.

Mr. RUSSELL.—That is all.

Thereupon defendant rested.

REBUTTAL BY THE GOVERNMENT.

TESTIMONY OF EDWARD C. HARKINS, FOR THE GOVERNMENT (IN REBUTTAL).

Thereupon EDWARD C. HARKINS was called and sworn as a witness on behalf of the Government, and testified in rebuttal as follows:

(By Mr. SHEETS.)

I am a federal officer. I visited No. 301 Second

(Testimony of Edward C. Harkins.)

Street on July 4, 1930. I went there with Agent Maguier. We entered the premises about 6:15 o'clock P. M. on that day. Mr. Osborne came in before we left. He did not at that time in my presence examine the mouth of James Dunn or his brother.

Q. You saw what took place?

A. Agent Maguier and I went to the premises. Agent Maguier questioned the man behind the bar who was the brother of Mr. Jim Dunn. This man said that his name was Dunn but he was not Jim Dunn. Jim Dunn was mentioned on the warrant and Agent Maguier at that time asked him to show his teeth, which he did, and I had taken his place by the door to keep the people in the place on account of other raids in town and he came back to me and he said, "That is the brother of the man we want, he has no teeth missing." A short time after that, probably 10 or 15 minutes later, Mr. Jim Dunn came in and said, "I guess I am [37] the man you want." So Agent Maguier asked him to show his teeth; he and I were present, and he had a place between his teeth on one side that appeared as if a tooth were missing, and I said, "Well, I guess you are the man we want." A few minutes later Mr. Burke and Mr. Osborne came in and Mr. Osborne identified Mr. Dunn as the man we wanted, Mr. Jim Dunn.

Cross-examination.

(By Mr. RUSSELL.)

Before Mr. Osborne identified James Dunn he looked at both Joe Dunn and James Dunn.

(Testimony of Edward C. Harkins.)

Mr. RUSSELL.—Q. When you say that Mr. Dunn had a hole in his teeth, how did you observe that? Did you force him to open his mouth?

A. I requested him to open his mouth.

Q. You could not see it without him raising his lips, could you? A. No.

Redirect Examination.

(By Mr. SHEETS.)

When James Dunn opened his mouth and showed his teeth I saw a space between his teeth from which it appeared the tooth was missing. He did not have to lift his lips; he just showed his teeth.

Recross-examination.

(By Mr. RUSSELL.)

I could not say whether there was a missing tooth in Jim Dunn's mouth. There was a space between the teeth. I don't know that there is any missing tooth. I would not say that there is a missing tooth. There is a space between the teeth that might be a missing tooth. Jim Dunn fitted the description on the warrant that was given me. On the night of July 4th I would estimate that the weight of Jim Dunn to be in the neighborhood of 200 pounds. The warrant called for a man weighing 185 pounds. I do not recall now [38] what his height was, but if I could stand alongside of him I could estimate it. I would say his height was about 5 feet 10. I do not recall that the warrant called for a man 5 feet 9. I would say that his hair was dark with gray on the temples. I would say

(Testimony of Edward C. Harkins.)

his eyes are brown; they could easily be called black eyes or dark eyes. I don't recall that the warrant called for a man with dark eyes. I don't recall that the warrant called for a man with black hair.

Q. But you say in your opinion that Mr. Jim Dunn fits the description?

A. At the time I read the description.

Q. Why was it that you and Mr. Maguier waited for Mr. Osborne to come in before you were satisfied to take Dunn? A. Because it was our orders to.

Q. Your orders? A. Yes.

Q. In other words, didn't you say we will wait until the undercover man comes in to make sure?

A. I don't recall those words.

Q. But you did wait until Osborne came in before you took Dunn?

A. Yes, certainly, we were instructed so to do.

Q. Didn't you ask Mr. Cralle to open him mouth?

A. Mr. Cralle?

Q. Yes, the little fellow that came in here.

A. I did not get a very good look at him.

Q. A little short man. A. I don't think so.

Q. This gentleman, Mr. Cralle, didn't you ask him to open his mouth? A. No, I did not.

Q. Did Mr. Maguier ask him in your presence?

A. Not to my knowledge.

Mr. RUSSELL.—That is all. [39]

TESTIMONY OF R. C. OSBORNE, FOR THE GOVERNMENT (IN REBUTTAL).

Thereupon R. C. OSBORNE was called and sworn as a witness on behalf of the Government and testified in rebuttal as follows:

Direct Examination.

(By Mr. SHEETS.)

I went to the premises, 301 Second Street, on July 4, 1930, with Deputy Marshal Burke. At that time I pointed out the defendant as the man who sold me the liquor. Agent Beam was not there at that time.

Cross-examination.

(By Mr. RUSSELL.)

When I went in there I did not look at Joe Dunn first and then at James Dunn.

Thereupon both sides rested.

EXCEPTION. No. 2.

Thereupon Mr. RUSSELL.—We have no surrebuttal but we again desire to move the Court for an instructed verdict, and if I may call your Honor's attention to the Indictment to Count 1, the nuisance, and to Count 2, the possession count. Those are directed, your Honor, to the night of the 4th of July. The charge is maintaining a nuisance and possession of liquor. We submit that there is no evidence of any sort to show that on the 4th of July there was any violation of the law; the viola-

tion if any, occurred on the 26th of June; and the result would be that the nuisance ceased at that time. There is no presumption that could arise against the defendant.

The COURT.—Is there evidence that liquor was bought there on the 4th of July?

Mr. SHEETS.—On the 26th of June, and the 4th of July being a [40] date, the Government would not be concluded in its proof to any date within one year preceding the date in the first count and three years preceding the date in the third count.

Mr. RUSSELL.—I do not think that would apply where it is a nuisance occurring on the 4th of July.

The COURT.—The motion is denied.

Mr. RUSSELL.—Note an exception.

Thereupon ALBERT E. SHEETS, Esq., counsel for the Government made his argument to the jury with replies made by Clifford A. Russell, Esq., and Eugene S. Selvage, Esq., as attorneys for the defendant, with closing argument being made by Mr. Sheets.

EXCEPTION No. 3.

During the course of the closing argument Mr. Sheets made the following statement to the jury:

"Now, the alibi is proved by one of the most contemptible methods that I have ever observed in a court. The defendant himself says 'I went to the ranch that day; I arrived there somewhere around noon. I left there some time between 3 and 4, and I arrived home somewhere between 7:30 and 8.'

He is not definite as to any of these times. He said he was seen by his own boy, his boy's friend, his two ranch-hands, two neighbors. Any one of those would have established the fact that he was out there."

To which statement counsel for the defendant duly and regularly excepted and assigned the same as misconduct on the part of the United States Attorney on the ground that it is not incumbent on the defendant to produce any witness, that the witnesses were available to the United States Attorney's office if they desired to call them.

The Court was thereupon requested by defendant to instruct the jury to disregard the statement and the Court thereupon requested the jurors to "eliminate those remarks." That defendant here designates this exception as his "Exception No. 3." [41]

Thereupon counsel for the Government proceeded with his argument.

EXCEPTION No. 4.

Upon the conclusion of the argument of Mr. Sheets and on behalf of the defendant, Mr. Russell stated to the Court:

"I did not desire to interrupt Mr. Sheets but in line with his previous argument he said that the defendant or they have not produced a man with a missing tooth; we assign that as misconduct and ask your Honor to instruct the jury that we do not have to bring in anybody."

Thereupon the Court stated:

"The statement of Mr. Russell is correct. It is not incumbent upon the defendant to prove his innocence. It is incumbent upon the Government to prove the defendant *b*uilty beyond and to the exclusion of all reasonable doubt; so you will disregard the remarks that were made by the District Attorney with reference to the inability or failure of the defendant to produce a witness here with a missing tooth or to produce any other witness here.

The defendant at the time duly and regularly excepted and still excepts to said statements so made by the United States Attorney and assigned and still assigns the same as misconduct and which defendant here designates as his "Exception No. 4."

Thereupon the Court gave the jury the following instructions:

CHARGE TO THE JURY.

The COURT. — (Orally.) Gentlemen of the Jury, the grand jury of this District has presented an indictment against James Dunn charging him with violating certain provisions of the Prohibition Law of the Government. The indictment charges, among other things, that on the 4th day of July, 1930, at a place known as No. 301–2d Street in the city of Eureka, said defendant did then and there knowingly and wilfully maintain a common nuisance in then and there knowingly and wilfully [42] committing a prohibited and unlawful act of keeping for sale at said place certain intoxicating liquor fit for use for beverage purposes, to wit:

five drinks of whisky and one drink of beer containing more than one-half of one per cent of alcohol by volume; the second count of the indictment charges the defendant with having unlawfully possessed the liquor I have mentioned; the third count charges the defendant with having on the 26th day of June, 1930, at the place I have mentioned, No. 301–2d Street, Eureka, then and there, knowingly and wilfully committed a prohibitted and unlawful act of sale of certain intoxicating liquor fit for beverage purposes, to wit: five drinks of whisky and one drink of beer.

The element of nuisance is the keeping of intoxicating liquor for sale. If you find from the evidence that the defendant had in his possession any liquor containing more than one-half of one per cent of alcohol by volume for the purpose of such sale, then you must find the defendant guilty. If you find that the defendant was illegally in possession of liquor then such illegal possession constitutes *prima facie* evidence that it was so kept for sale, and as to such defendant so possessing such liquor the burden of proof is upon him to establish that such liquor was legally acquired, possessed and used, and such possession unexplained by the defendant plus the statutory presumption is sufficient to establish the maintenance of a common nuisance.

The charge as to possession needs no explanation. If you find from the evidence that the defendant unlawfully possessed intoxicating liquor, of course it will be your duty to find him guilty of that

charge; and the same with the charge as to sale, the charge as to sale being as I have heretofore stated that on or about the 26th day of June, 1930, at the place of business of this defendant he did then and there unlawfully sell such intoxicating liquor. [43]

Of course, if after a consideration of all of the evidence in the case you believe that he is guilty beyond and to the exclusion of all reasonable doubt of having sold liquor at his said place of business, it will be your duty to find him guilty of that charge.

Gentlemen, you are to understand at the very outset that the indictment against the defendant is a mere charge or accusation against him. It is no evidence whatsoever of his guilt nor are you permitted to indulge in any presumption of any kind against him because this charge has been placed against him by the Government.

The defendant enters upon the trial of this case with the presumption of innocence, and that presumption remains with him throughout the trial and until it is overcome by evidence. The defendant is not required to prove his innocence, but the Government is required by law to prove that he is guilty beyond and to the exclusion of all reasonable doubt. Upon the Government rests the burden of proving every material allegation in the indictment. You are the exclusive judges of the credibility of the witnesses and the weight of the evidence. You may judge of the credibility of a witness by his appearance upon the stand, by his manner of testifying, whether he has contradicted himself or whether he has been contradicted by other witnesses, whether he has

shown any bias, whether he has an interest in the outcome of the case, and by all those things you may judge his credibility.

The defendant here has seen fit to take the stand and testify in his own behalf. That was his right, and you are to weigh his testimony in the same scales that you weigh the testimony of other witnesses. You are to apply to his testimony the same test that you apply to the testimony of other witnesses, save and except in his case you may take into account the fact that he is the defendant [44] in the case and as such has a personal interest in the outcome of the case.

Where the evidence is susceptible of two interpretations, one of guilt and one of innocence, it will be your duty to favor the interpretation of innocence.

If you find from the evidence that the defendant was in possession of the liquor mentioned in the indictment, then as to such defendant this constitutes a *prima facie* showing that it was possessed illegally and the burden is then upon him to show that it was legally possessed.

The Government has introduced in this case the evidence of prohibition agents who have testified that on the 26th day of June they purchased liquor at the defendant's place in this city, but the Government has not introduced any actual intoxicating liquor which it claims to have been sold by the defendant. It has introduced proof that this defendant took part in and actually sold the prohibition officers intoxicating liquor which they con-

sumed in this place. This evidence, if believed by you, is sufficient to establish that fact.

EXCEPTION No. 5.

Thereupon the Court gave the jury the following instruction:

"It is difficult and frequently impossible for those whose business it is to enforce the prohibition law to secure by purchase and take away with them a bottle containing the actual liquor involved in the transaction, and the presence in court of the actual intoxicating liquor which may have been purchased is not required. This evidence may be supplied by testimony of witnesses that they purchase intoxicating liquor and that from their knowledge and experience such liquor was in fact intoxicating."

EXCEPTION No. 6.

Thereupon the Court gave the jury the following instruction: [45]

"The familiar rule of the civil law that a person is held to be responsible for the act of an agent employed by him when the act is done in the course of the agency and in furtherance of it is equally applicable in the criminal law. When an indictment charges a defendant with crime it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the act was committed by an agent of the defendant and committed in the course of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious

or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case.

I instruct you, Gentlemen, that it is the law that 'Whoever directly commits any act constituting an offense defined in any law of the United States or aids or abets or procures its commission is a principal.' Aid means to help, support, assist, one who helps or promotes in doing something. Abet means to instigate or encourage by aid or countenance; to contribute as an assistant or instigator in he commission of an offense. The owner of an establishment or business who has knowledge that an employee is maintaining a liquor nuisance therein is an aider and abetor and may be convicted as a principal.

The defendant has introduced evidence tending to show that he was not present at the time and place of the commission of the crime charged in this indictment. It is your duty in considering this evidence to take into consideration all of the facts in this case and to scrutinize carefully the evidence in reference to the alibi. If the evidence of an alibi in connection with all the other evidence raises a reasonable doubt of the presence of the defendant at the time and place of the crime he should be acquitted. [46]

I have said to you, Gentlemen, at the very outset of my instructions that you cannot convict this defendant unless you believe that he is guilty beyond and to the exclusion of all reasonable doubt. Now reasonable doubt means exactly what the words

"reasonable doubt" import. It means a doubt based upon reason. It does not mean a doubt based upon suspicion or whim or fancy that may be in the juror's mind, but it is a doubt that must be based upon reason. A reasonable doubt has been defined to be that state of the case when after a consideration and comparison of all of the evidence in the case a juror finds his state of mind to be that he cannot say that he feels an abiding conviction to a moral certainty of the truth of the charge. Your verdict must be unanimous.

Any exceptions?

Mr. RUSSELL.—If your Honor please, the defendant desires to except to that portion of the instructions—I think they were written and submitted to your Honor—your Honor may help me with the exact wording—that it is difficult for those charged with the enforcement of prohibition laws to take away a bottle of evidence, of liquor; we feel that that is not a proper instruction and except to that.

We also feel that the instructions given by your Honor with reference to agency is not proper in this case because it would tend to convince the minds of the jury, and for that reason we note an exception to that. The evidence as we understand it is a direct statement that Mr. Dunn himself sold the liquor. There is no evidence in the case of any agent selling it.

The COURT.—As to whether or not the defendant here was maintaining a nuisance, I take it that it is the law that if he owns these premises and he

knows someone was selling liquor there he would be responsible for the act of that agent, whoever that would be. [47]

Mr. RUSSELL.—We would concede that, but the evidence, and the only evidence is that the sale, if any, was made by Mr. Dunn. There is not any question of agency.

The COURT.—I understand your contention. The jury may now retire.

Thereupon the jury retired to consider their verdict, and thereafter returned to the court with a verdict of guilty on Count One charging nuisance and a verdict of not guilty on Count Two charging possession and a verdict of not guilty on Count Three charging sale.

EXCEPTION No. 7.

Thereupon the Court arraigned the defendant for judgment and the pronouncement of sentence. The defendant was asked to show cause, if any he had, why sentence should not be pronounced upon him, according to law. Upon motion of counsel for defendant the time for pronouncement of sentence was continued to July 25, 1930, at 10 o'clock A. M. At that time and within the time prescribed by law, and before the judgment of the Court was entered upon the verdict, the defendant duly and regularly made his motion for a new trial in said cause, which was by the Court denied.

To which ruling of the Court, denying said motion for a new trial, the defendant then and there duly and regularly excepted, and still excepts, here designates as his "Exception No. 7."

EXCEPTION No. 8.

Thereupon, and within the time prescribed by law, and before the judgment of the Court was entered upon the verdict, the defendant made a motion in arrest of judgment, which motion was ordered by the Court denied.

To which ruling of the Court, denying said motion in arrest of judgment, the defendant then and there duly and regularly excepted, and still excepts and here designates as his "Exception No. 8." [48]

Whereupon the Court rendered its judgment directing that James Dunn, said defendant, be imprisoned for the period of one year and pay a fine in the sum of Five Hundred Dollars ($500.00.)

That defendant's proposed bill of exceptions was lodged on the 4th day of August, 1930.

That said defendant hereby presents the foregoing as his bill of exceptions herein and asks that the same be allowed, signed and sealed and made a part of the record in this case.

Dated, September 23, 1930.

EUGENE S. SELVAGE,
CLIFFORD A. RUSSELL,
Attorneys for Defendant. [49]

[Title of Court and Cause.]

STIPULATION RE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions is

correct and that the same may be signed, settled, allowed and sealed by the Court.

Dated, September 23d, 1930.

GEO. J. HATFIELD,
A. E. L.,
United States Attorney.
EUGENE S. SELVAGE,
CLIFFORD A. RUSSELL,
Attorneys for Defendant. [50]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

This bill of exceptions having been duly presented to the court within the time allowed by law and the rules of the court, is now signed, sealed and made a part of the records in this case, and is allowed as correct.

Dated, September 23, 1930.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Sep. 25, 1930. [51]

[Title of Court and Cause.]

PETITION FOR APPEAL AND SUPERSEDEAS.

To the Honorable A. F. ST. SURE, District Judge:

The above-named defendant feeling himself aggrieved by the verdict of the jury rendered on the

24th day of July, 1930, and the judgment and sentence entered thereon in this cause on the 25th day of July, 1930, does hereby appeal from said judgment and sentence to the Circuit Court of Appeals for the Ninth Circuit for the reason specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and sentence were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made, and that this defendant be awarded a supersedeas upon said judgment and all necessary and proper process including bail pending his appeal.

Dated: Eureka, California, this 30th day of July, 1930.

JAMES DUNN,
Defendant.

EUGENE S. SELVAGE,
CLIFFORD RUSSELL,
Attorneys for Defendant. [52].

Service of the within petition is hereby admitted this 4th day of August, 1930.

GEO. J. HATFIELD,
United States Attorney.

Service of the within petition for appeal, etc., by copy admitted this 4th day of Aug., 1930.

GEO. J. HATFIELD,
Attorney for Pltf.

[Endorsed]: Filed Aug. 4, 1930. [53]

[Title of Court and Cause.]

ORDER ALLOWING PETITION FOR APPEAL AND SUPERSEDEAS.

The petition for appeal and supersedeas herein prayed for by James Dunn, defendant and appellant, pending the decision upon said petition for appeal, is hereby allowed and the defendant is admitted to bail upon the petition for appeal in the sum of Five Thousand Dollars.

The bond for costs on the petition for appeal is hereby fixed at Two Hundred Fifty Dollars.

Dated: Eureka, California, this 4th day of August, 1930.

A. F. ST. SURE,
United States District Judge.

Service of the above order allowing appeal and supersedeas is hereby admitted this 4th day of August, 1930.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: Filed Aug. 5, 1930. [54]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

James Dunn, defendant in the above-entitled cause and plaintiff in error herein, having petitioned for a writ of error in this cause directed to this Court from the United States Circuit Court of Appeals for the Ninth Circuit, now makes and files with his petition the following assignment of errors, upon which he will apply for a reversal of the judgment and sentence of the Court, as entered herein; which said errors and each of them are to the great detriment, injury and prejudice of the said defendant, and are in violation of the rights conferred upon him by law; to wit:

I.

The Court erred in denying defendant's motion for a directed verdict in his favor which was made at the close of the Government's case on the ground that the evidence was insufficient to show that defendant on the fourth day of July, 1930, maintained a or any common nuisance as presented in the first count of said Indictment, and on the further ground that there was no evidence whatsoever that any liquor was kept for sale on said premises on the fourth day of July, 1930, as alleged in the Indictment. The only evidence being that on the 26th day of June, 1930, a different date than set forth in the Indictment, the two Government [55] agents purchased six drinks of liquor from the defendant, all as set out in Defendant's Exception No.

1, appearing on pages 6 and 7 of the bill of exceptions.

Which said ruling has been heretofore designated as Defendant's Exception No. 1.

II.

The Court erred in denying defendant's motion for a directed verdict in his favor, which was made at the close of the case on the ground that the evidence was insufficient to show that defendant on the fourth day of July, 1930, maintained a or any common nuisance as presented in the first count of said Indictment, and on the further ground that there was no evidence that any liquor was kept for sale or possessed on said premises on the fourth day of July, 1930, as alleged in the Indictment, the only evidence being that on the 26th day of June, 1930, a different date than set forth in the Indictment, the two agents purchased six drinks of liquor from the defendant, and upon the further ground that no presumption could arise against the defendant for maintaining a nuisance on July 4th, 1930, when the only testimony related to a sale purported to have taken place on June 26th, 1930, all as set out in Defendant's Exception No. 2, appearing on page 18 of the bill of exceptions.

Which said ruling has been heretofore designated as Defendant's Exception No. 2.

III.

The Assistant United States Attorney erred during the course of his closing argument to the jury when he made the following statement, to wit:

> "Now, the alibi is proved by one of the most contemptible methods that I have ever observed in a court. The defendant himself says, 'I went to the ranch that day; I arrived there some time between 3 and 4, and I arrived home somewhere between 7:30 and 8.' He is not definite as to any of these times. He said he was [56] 'seen by his own boy, his boy's friend, his two ranch-hands, two neighbors. Any one of those would have established the fact that he was out there,"

on the ground that it is not incumbent upon the defendant to produce any witness upon the trial, all as set forth in Exception No. 3, appearing on pages 18 and 19 of the bill of exceptions.

Which statement has been heretofore assigned as Defendant's Exception No. 3.

IV.

The Assistant United States Attorney erred during the course of his closing argument to the jury when he stated in substance, "'that the defendant or they have not produced a man with a missing tooth,'" on the ground that there is no duty resting upon the defendant to produce any witnesses, and that it is improper for the District Attorney to make reference to the inability or failure of the defendant to produce a witness with a missing tooth or to produce any other witness, all as set forth in Exception No. 4, appearing on pages 19 and 20 of the bill of exceptions.

Which said statement has been heretofore designated as Defendant's Exception No. 4.

V.

The Court erred in giving to the jury the following instruction, to wit:

> "It is difficult, and frequently impossible for those whose business it is to enforce the prohibition law to secure by purchase and take away with them a bottle containing the actual liquor involved in the transaction, and the presence in court of the actual intoxicating liquor which may have been purchased is not required. This evidence may be supplied by testimony of witnesses that they purchased intoxicating liquor and that from their knowledge and experience such liquor was in fact intoxicating." [57]

on the ground that it is improper for the Court to instruct the jury in generalities with regard to the difficult and frequent impossibility of securing actual liquor which may be presented upon a trial, and implying that sufficient evidence in this case may be supplied by testimony of Government witnesses that purchased liquor without further instructing the jury that the same weight and no more, and the same rules of evidence should apply to their testimony as to any other witness in the case, all as contained in Exception No. 5, appearing on page 24, in the bill of exceptions.

Which said instruction has been heretofore designated as Defendant's Exception No. 5.

VI.

The Court erred in giving the jury the following instruction:

"The familiar rule of the civil law that a person is held to be responsible for the act of an agent employed by him when the act is done in the course of the agency had and in furtherance of it is equally applicable in the criminal law. When an indictment charges a defendant with crime it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the act was committed by an agent of the defendant, and committed in the course of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case.

I instruct you, Gentlemen, that it is the law that 'Whoever directly commits any act constituting an offense defined in commission is a principal.' Aid means to help, support, assist, one who helps or promotes in doing something. Abet means to instigate or encourage by aid or countenance; to contribute as an [58] assistant or instigator in the commission of an offense. The owner of an establishment or business who has knowledge that an employee is maintaining a liquor nuisance therein is an aider and abettor and may be convicted as a principal";

on the ground that there was no evidence in this case of any agent of defendant making a sale and

no evidence upon which to base agency, and that the instruction would tend to and did confuse the jury, by inferring that some other person who was an employee of defendant may have made the sale complained of, and that if so, the defendant would be responsible therefor, all as contained in Exception No. 6, appearing on pages 24 and 25 of the bill of exceptions.

Which instruction has been heretofore assigned as Defendant's Exception No. 6.

VII.

The Court erred in denying the motion for a new trial made on behalf of the defendant and plaintiff in error after the verdict had been returned, but before the judgment of the Court had been entered. The grounds of said motion were as follows:

1. That the verdict in said cause is contrary to law.

2. That the verdict in said cause was not supported by the evidence in the case.

3. That the evidence in said cause is insufficient to justify said verdict.

4. That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

5. Newly discovered evidence, material to the defendant, which he could not, with reasonable diligence have discovered, and produced at the trial.

SPECIFICATIONS OF THE INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT. [59]

The defendant and plaintiff in error herein specifies the insufficiency of the evidence to justify the verdict as follows:

a. There is no evidence proving or tending to prove that James Dunn, said defendant and plaintiff in error, on the fourth day of July, 1930, at a place known as No. 301 Second Street, in the City of Eureka, California, maintained a or any common nuisance as presented in the first count of said Indictment.

b. That the evidence as produced by the Government was confined to a sale of six drinks purported to have been made by defendant at approximately 7:30 P. M. on the 26th day of June, 1930, to two Government agents. That there was no evidence of other violations or habitual sales, and likewise no evidence from which such acts may reasonably be deducted. That nuisance implies a continuity of action, and not a sale at one particular time.

c. That there was no evidence of any sale of liquor or any evidence showing that the same was kept for sale in said premises after June 26th, 1930, and that it will be presumed that the nuisance, if any existed on June 26th, 1930, was abated prior to July 4th, 1930, the date presented in the first count of the Indictment.

d. That the description of the person purported to have made the sale on June 26th, 1930, to the Gov-

ernment agents, does not conform with the actual description of defendant or any person employed by defendant, and working in said premises, as shown by the affidavit of Joe Dunn attached to the motion for a new trial, which avers in part that James Dunn, Joe Dunn, Charles Granger and Walter Kuchan worked in said premises. That each of said employees of defendant is described in said affidavit as follows, to wit:

Joe Dunn is six feet tall, weights one hundred and ninety-four pounds, has dark hair and eyebrows, has no teeth missing in the front of his mouth, has grey eyes, smooth shaven, age forty-seven years, white race. [60]

That Charles Granger is five feet six inches tall, weighs one hundred and eighty-five pounds, has grey hair and eyebrows, has false teeth but no teeth missing, brown eyes, has grey moustache, age seventy-two years, white race.

That Walter Kuchan is five feet eight inches tall, weighs between one hundred and forty and one hundred and forty-five pounds, dark hair, no teeth missing, brown eyes smooth shaven, age between forty and forty-five years, white race.

That the person selling the six drinks to them on June 26th, 1930, was described by the two Government agents as being five feet nine inches in height, weight about one hundred and eighty-five pounds, age fifty years, dark hair and eyes, smooth shaven, white race, with a tooth missing in upper jaw in front, all as duly *excepted in* Exception No. 7, contained on page 27 of the bill of exceptions.

VIII.

The Court erred in denying the motion in arrest of judgment made on behalf of the defendant and plaintiff in error. Said motion was made on the following grounds, to wit:

I.

That the verdict is contrary to law in that the evidence was confined solely to a sale at one time with no evidence of other violations or habitual sales, and likewise with no evidence from which such acts may reasonably be deducted. Therefore the penalty provided in the Act for unlawful sale would alone apply.

That the section penalizing as a nuisance the maintaining of premises on which liquor is sold, implies a continuity of action and not a single sale.

II.

That the verdict convicting the defendant of maintaining a nuisance and acquitting him of possession and sale is inconsistent, cannot be reconciled and cannot stand for the following reasons, to wit: The testimony of the Government was to the effect [61] that defendant made a sale of six drinks to two Government agents on June 26th, 1930. Of this sale the jury found the defendant not guilty. There was no evidence of any other sale by any other person whomsoever, and there was no evidence that any liquor other than the six drinks was ever sold or kept on said premises.

That by finding said defendant not guilty of said sale and not guilty of said possession the jury can-

not as a matter of law find defendant guilty of nuisance.

III.

That Count No. One of the Indictment on file herein does not present, state or charge facts sufficient to constitute a public offense under the laws of the United States against this defendant.

All as contained in Exception No. 8, appearing on page 27 in the bill of exceptions.

Which said ruling has been heretofore designated as Defendant's Exception No. 8.

WHEREFORE, defendant and plaintiff in error prays that for the reasons stated herein that the judgment rendered by the United States District Court for the Northern District of California, in this cause, be reversed.

JAMES DUNN,
Defendant,
By EUGENE S. SELVAGE,
CLIFFORD RUSSELL,
Attorneys for Defendant.

Service of the within assignment of errors is hereby admitted this 4 day of August, 1930.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: Filed Aug. 4, 1930. [62]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON WRIT OF ERROR.

The Clerk of this court is hereby requested and directed to prepare and certify a transcript of the record in the above-entitled case for the use of the Circuit Court of the United States, by including therein the following:

Indictment.

Minutes of said court referring to the plea of not guilty as entered by defendant.

Bill of exceptions.

Verdict.

Motion to vacate verdict.

Motion for new trial.

Motion in arrest of judgment.

Judgment on verdict of guilty.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Certificate to transcript.

Original writ of error and citation on writ of error, with return to writ of error.

This praecipe.

Notice of filing praecipe.

CLIFFORD RUSSELL,
EUGENE S. SELVAGE,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Aug. 4, 1930. [63]

[Title of Court and Cause.]

NOTICE OF FILING PRAECIPE FOR TRANSCRIPT.

To GEORGE J. HATFIELD, United States Attorney:

Please take notice that on the —— day of Aug., 1930, the undersigned filed with the Clerk of this court a praecipe for the record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit on writ of error sued out in the above cause, a copy of which praecipe is herewith served on you.

CLIFFORD RUSSELL,
EUGENE S. SELVAGE,
Attorneys for Plaintiff in Error.

Service of the within notice and copy of praecipe is hereby admitted this 4th day of Aug., 1930.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: Filed Aug. 4, 1930. [64]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 64 pages, numbered from 1 to 64, inclusive, contain a full, true and correct transcript of certain records

and proceedings in the case of United States vs. James Dunn, No. 4718, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of twenty-six and 30/100 ($26.30) Dollars, and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, this 8th day of October, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [65]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the

Northern District of California, wherein James Dunn is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ————, United States District Judge for the Northern District of California, this 13th day of September, A. D. 1930.

FRANK H. KERRIGAN,
United States District Judge.

Service by receipt of copy admitted this 13th day of Sept., 1930.

ALBERT E. SHEETS,
D.,
Atty. for Pltff.

[Endorsed]: Filed Sep. 13, 1930. [66]

[Endorsed]: No. 6329. United States Circuit Court of Appeals for the Ninth Circuit. James Dunn, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed December 8, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6329

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES DUNN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

PROCEEDINGS HAD IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable JEREMIAH NETERER, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Clifford A. Russell, counsel for the appellant, and by Mr. H. A. van der Zee, Assistant United States Attorney, counsel for the appellee, and submitted to the court for consideration and decision.

At a stated Term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighth day of June, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honor-

able WILLIAM H. SAWTELLE, Circuit Judge; Honorable JEREMIAH NETERER, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Before WILBUR and SAWTELLE, Circuit Judges, and NETERER, District Judge.

WILBUR, Circuit Judge.—Appellant was tried on an indictment containing three counts. He was acquitted upon the second and third counts and convicted upon the first count. Appellant contends that the verdicts are inconsistent and seeks a rever-

sal upon that ground. The liquor involved in the three counts is the same, five drinks of whiskey and one drink of beer. It is charged in the third count that this liquor was unlawfully sold on the 26th day of June, 1930. In the second count it is charged that this liquor was unlawfully possessed on the 4th day of July, and in the first count that the appellant maintained a common nuisance on the 4th day of July, 1930, at 301 Second Street, Eureka, Humboldt County, California, in keeping for sale at said place the liquor described in the second and third counts.

Upon the trial appellant testified, and his counsel stipulated, that he was the owner of the place above described. It appears from the evidence that this place was fitted up with a bar in a rear room and another in a cigar-store in a front room. The rear room was used as a pool-room and was fitted up for the sale of drinks. Appellant testified that the bar in the rear room was equipped with whiskey glasses in which he dispensed "bitters." Two prohibition officers testified they entered the premises with two unknown men, called for and paid for drinks which were served over the bar without any apparent attempt at secrecy. The prohibition officers identified the appellant as the person who sold them the drinks at the time and place in question. If the case had been submitted to the jury upon this evidence alone the question of the inconsistency of the verdict would present a somewhat different aspect than that presented by the record before us. The appellant took the stand on his own behalf and produced witnesses who testified to the effect that on the 26th day of June the appellant was not in the

premises at the time and place of sale, but was returning from a ranch about two hours distant, arriving there after the time of the alleged sale. In addition to this evidence the Government's witnesses were cross-examined with a view of creating a doubt as to the accuracy of their testimony concerning the identity of the person who sold the liquor to them at the time and place in question. The evidence, however, on all counts, related solely to a transaction on the 26th day of June, and there is no evidence of any sale or possession on the 4th of July. It is pointed out in the briefs, as it has been in a number of our decisions, that there is a conflict in the decisions of our Circuit Courts of Appeal upon the question of inconsistent verdicts.

The matter has been presented to this court in a number of cases in which this court has found it unnecessary to determine which line of authority it would adopt. This court has been able so far in cases presented to it to steer a middle course. Lambert vs. U. S., 26 F. (2d) 773; Hesse vs. U. S., 28 F. (2d) 770; U. S. vs. Anderson, 31 F. (2d) 436; Pankratz Lbr. Co. vs. U. S., (No. 6363) decided May 25, 1931. In U. S. vs, Anderson, *supra*, the decision was delivered by District Judge Bean. In that case it was held that where the verdicts were not legally inconsistent the verdict of guilty would not be reversed if it were supported by the evidence notwithstanding the fact that the acquittal upon some of the counts charging overt acts as separate offenses was difficult to reconcile with the verdict of the jury, stating in that connection:

"It may be difficult, in view of the rule that the act of one conspirator in furtherance of the object of the conspiracy is the act of all, to understand the reasoning of the jury in convicting Anderson on the conspiracy charge, and not the substantive offenses; but it is not for us to speculate on that question. It is enough that the verdict on the conspiracy charge is supported by the evidence and responds to the issue."

Our more recent opinion, delivered by Judge Neterer, is to the same effect, that is, that where the offense is separate and distinct and supported by the evidence, the fact that the acquittal of other defendants through whom the defendant corporation was acting, did not require the reversal of the conviction of the corporation, although the corporation acted through the defendants who were acquitted.

In the case at bar there is no legal inconsistency between an acquittal upon the charges of sale and possession and the conviction upon a charge of nuisance. The inconsistency, if any, arises from the fact that the evidence on behalf of the Government with reference to the three offenses is identical, and it is illogical for a jury to accept the testimony of these witnesses on one count and reject them on the other two. But this apparent inconsistency is largely dispelled by a consideration of the evidence offered by the defense. This evidence was calculated to, and no doubt did, raise a reasonable doubt in the minds of the jury as to whether or not the defendant personally sold the liquor to the Government

agents at the time and place in question. In view of the fact that the jury was instructed that the appellant might act through agents and employees and was instructed in effect that if he so acted through an agent or employee in possession or sale of liquor he was guilty as a principal of the illegal sale and illegal possession, the effect of the verdict is that the jury had a reasonable doubt as to whether or not the person who sold the liquor at the time and place in question was acting as the agent for and under the authority of the appellant. The evidence showed that appellant had several employees, including his brother, operating his place of business. The verdict of the jury on the first count shows that they are satisfied beyond a reasonable doubt that the premises were kept and maintained and liquor was there possessed for purposes of illegal sale, and while they are not able to say beyond a reasonable doubt that the actual sale was made by an authorized agent of the appellant, they were convinced that the appellant kept the liquor there for the purpose of sale. As pointed out in U. S. vs. Anderson, *supra,* it is not the province of this court to try to determine the basis for the verdict of the jury. Under our system of law the jury is the sole judge of the facts and the credibility of witnesses and their verdicts are not to be overturned because they seem illogical.

The case of Rosenthal vs. U. S., 276 Fed. 714, opinion by Judge Ross, is cited by the appellant in support of his contention. This decision was explained by the author thereof in a subsequent decision by this court involving an indictment con-

taining two counts, one charging unlawful possession of liquor, and the second charging the maintenance of a common nuisance by selling liquor in a designated place of business. In the latter case it is held that the record failed to show that the two alleged offenses related to the same transaction. The decision is criticised in an opinion by Judge Amidon, sitting in the Circuit Court of Appeals of the Eighth Circuit, 7 F. (2d) 615, 616. It is also cited in the same circuit in Morris vs. U. S., 7 F. (2d) 785. In Carrignan vs. U. S., 290 F. 189, in an opinion by Judge Evan A. Evans, the Rosenthal case was cited and distinguished from the case involving an unlawful sale of liquor, and the maintenance of a public nuisance on the ground that the latter were separate and distinct offenses, holding that an acquittal of the unlawful sale was not inconsistent with a conviction of maintaining a nuisance. Referring to Rosenthal vs. U. S., *supra,* it is said:

> "In that case [Rosenthal vs. U. S.] the defendant was charged with having purchased and received stolen property, with knowledge that it was stolen, and also charged by another count with having the same property in his possession, with like knowledge, the evidence showing that the two counts related to the same transaction. The second offense charged was but a part of the first offense, and separate convictions for the two alleged offenses could not have been sustained. It was therefore held that a verdict of not guilty on the first count necessarily relieved defendant from liability on the second count."

It is sufficient for the purposes of this case to say that the decision in Rosenthal vs. U. S., as explained later by its author in Baldini vs. U. S., 286 Fed. 133, in so far as it is inconsistent with the views we have expressed, is modified by our subsequent decisions hereinbefore cited.

The fact that the appellant interposed an alibi and thus raised a clear distinction as to the evidence to support the charges in the three counts of the indictment, together with his admitted ownership of the place in which it was charged that the common nuisance was maintained and the inferences with relation thereto resulting from the readiness with which intoxicating liquor was produced and sold in such place upon the request of four strangers, sufficiently differentiated the evidence as to the separate counts as to require an affirmance even under the rule most favorable to defendants as to inconsistent verdicts.

The appellant excepted to portions of the closing argument of the district attorney and assigned the making of said argument as misconduct. The argument excepted to was to the effect that inasmuch as the defendant has testified that his son and a boy friend, two ranch hands and two neighbors knew of his visit to his ranch on the day of the alleged sale of liquor by the appellant, that "any one of these would have established the fact that he was out there." The exception was on the ground that it was not incumbent on the defendant to produce any witnesses and that the witnesses were available to the United States attorney's office if they desired to

call them. The court, upon motion of the defendant, instructed the jury to "eliminate those remarks." A similar exception was made to the argument of the district attorney that the appellant had not "produced the man with the missing tooth." The court instructed the jury that the position of the appellant was correct, that it was not incumbent upon the defendant to prove his innocence, but it was incumbent upon the Government to prove the defendant guilty beyond a reasonable doubt. They were thereupon instructed to disregard the remarks made by the district attorney "with reference to the inability or failure of the defendant to produce a witness here with a missing tooth, or to produce any other witness." In view of the instruction of the trial court in response to the appellant's motion and in view of the verdict of the jury upon the two counts charging the appellant with having made the sale and having possessed the liquor, it is evident that the appellant was not harmed by the statement of the district attorney.

We do not wish to be understood as deciding whether or not the comment of the district attorney upon the failure to produce the witness referred to was erroneous. The question is one of some difficulty (Graves vs. U. S., 150 U. S. 118; Rostello vs. U. S., 36 Fed. 899; citing 16 Cor. Jur., sec. 1023; 10 R. C. L., sec. 886), and the action of the trial court in granting the motion of the appellant was a wise disposition of the matter.

A more serious breach of propriety on the part of the district attorney is the following statement:

"Now, the alibi is proved by one of the most contemptible methods that I have ever observed in a court." It is difficult to understand from the record the basis of the statement of the district attorney as to the "contemptible methods" used in establishing an alibi unless the term is used in the sense of "pitifully inadequate." However, the elaboration of the argument of the district attorney and the ground of objection thereto was directed wholly to the failure of the defendant to call corroborating witnesses who were available to him, and, as we pointed out, the error, if any, in that regard was cured by the action of the trial Judge. We may add here that being unable to see any justification for the use of the word "contemptible" or any basis in the record for such a claim, counsel were requested upon the argument to enlighten the court upon that subject, and in response to the question of the court it appears that the statement of the district attorney was predicated upon an answer elicited from one of the appellant's witnesses upon cross-examination by the district attorney himself and not by the accused. It is sufficient, however, to say that the matter was not effectively called to the attention of the court, and that the court instructed the jury to disregard "these remarks."

Judgment affirmed.

[Endorsed]: Opinion. Filed) June 8, 1931. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 6329.

JAMES DUNN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, It is now here ORDERED AND ADJUDGED by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Jun. 8, 1931. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the twenty-second day of July, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of appellant, filed June 27, 1931, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. Clifford A. Russell, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including September 22, 1931; and in the event the petition

for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, August 20, 1931.

[Endorsed]: Filed Aug. 26, 1931. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-one (91) pages, numbered from and including 1 to and including 91 to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 15th day of September, A. D. 1931.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is advanced and assigned for argument on Monday, November 23rd after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1931

No. 393

JAMES DUNN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF

RAYMOND T. COUGHLIN
Bryte Building,
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IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1931

No.....

JAMES DUNN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals

For the Ninth Circuit

To the Honorable Charles Evans Hughes, Chief Justice of the United States Supreme Court, and to the Associate Justices of said court.

The Petitioner, JAMES DUNN, respectfully represents:

THE DECISION BELOW.

1. On June 8th, 1931, the United States Circuit

Court of Appeals for the Ninth Circuit affirmed a Judgment of the District Court of the United States for the Northern District of California convicting petitioner of a violation of the Jones-Stalker Act.

2. A rehearing was denied on the 22nd day of July, 1931.

3. The opinion of the Circuit Court of Appeals for the Ninth Circuit will be found in the transcript of record filed herewith. This opinion has not yet been reported.

SUMMARY OF THE MATTER INVOLVED

1. The Petitioner was charged by an indictment containing three counts with violating the Jones-Stalker Act. Under the first count petitioner was charged with maintaining, on the fourth day of July, 1930, a common nuisance at a place known as number 301 Second Street, in the City of Eureka, County of Humboldt, State of California, by then and there keeping for sale at said place certain intoxicating liquors fit for beverage purposes, to-wit: Five drinks of whiskey and one drink of beer.

Under the second count the defendant was charged with the possession of the same five drinks of whiskey and one drink of beer.

Under the third count the defendant was charged with the sale of the same five drinks of whiskey and one drink of beer.

2. The evidence as introduced on the part of the Government was very short, being in substance as follows:

(a) That petitioner was the owner of premises number 301 Second Street in the City of Eureka, County of Humboldt, State of California. That the premises consisted of a room fronting on Second Street, containing fishing tackle, sporting goods, cigars, and soft drinks for sale, with a larger room to the rear, containing pool tables.

(b) One Federal prohibition agent testified that about 7:30 o'clock P. M. on the 26th day of June, 1930, in company with another prohibition agent and two unknown men, he visited said premises. At that time they purchased, so said agent testified, from defendant in the rear room, five drinks of whiskey and one drink of beer, which they drank and for which they paid $1.50. The sale and drinking of the six drinks being accomplished within the space of a few minutes.

The other prohibition agent testified upon direct examination substantially to the same effect.

3. A motion for directed verdict was made by petitioner at the close of the Government's case, and again at the close of the case, on the ground that the evidence was insufficient to show that defendant on the 4th day of July, 1930, maintained a common nuisance as presented in the first count of the indictment. Said motions were denied by the Court.

4. The defendant was convicted on the first count of said indictment of maintaining a common nuisance, and was acquitted on the second count of possession, and was acquitted on the third count of sale.

Judgment upon said verdict was entered, and the court sentenced the defendant to be imprisoned for the period of one year in the county jail, Contra Costa County, California, and pay a fine of five hundred dollars.

5. During the course of the trial important questions arose which are briefly stated in the following "reasons relied on for the allowance of the Writ."

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided important questions of general law as involved in this case in a way untenable and in conflict with the weight of authority and in this regard petitioner particularly represents:

(a) The evidence disclosed a single sale of liquor on the 26th day of June, 1930, without evidence of any sort to show any continuity of the alleged violation.

(b) The Courts below refused the application of the rule sustained by numerous cases to the effect that "a common nuisance implies a continuity of violations and that a single sale with no circumstances warranting the inference that the place where the sale is made is maintained for any of the unlawful purposes denounced by the statutes, is insufficient to sustain a conviction for maintaining a common nuisance."

2. The Court erred in giving the jury the following instruction to-wit:

> "The familiar rule of the civil law that a person is held to be responsible for the act of an agent employed by him when the act is done in the course of the agency had and in furtherance of it is equally applicable in the criminal law. When an indictment charges a defendant with crime it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the act was committed by an agent of the defendant, and committed in the course of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case."

on the ground that there was no evidence in this case of any agent of defendant making a sale and no evidence upon which to base agency, and that the instruction would tend to and did confuse the jury, by inferring that some other person who was an employee of defendant may have made the sale complained of, and that if so, the defendant would be responsible therefor, and on the further ground a principal cannot be held liable for the act of an agent unless he has knowledge thereof.

3. That the verdict convicting the defendant of maintaining a nuisance and acquitting him of possession and sale is inconsistent, cannot be reconciled and cannot stand for the following reasons, to-wit: The testimony of the Government was to the effect that defendant made a sale of six drinks to two Government agents on June 26, 1930. Of this sale the jury found the defendant not guilty. There was no evidence of any other sale by any other person whomsoever, and there was no evidence that any liquor other than the six drinks was ever sold or kept on said premises.

That by finding said defendant not guilty of said sale and not guilty of said possession, the jury cannot as a matter of law find the defendant guilty of nuisance.

There is a conflict of authority among the United States Circuit Courts upon the question of inconsistent verdicts of this nature, as shown by the brief in support of this petition, filed herewith.

Your petitioner respectfully represents that this case presents highly important questions of general law which should be settled by this Honorable Court.

WHEREFORE, your petitioner believing that the aforesaid judgment of the United States Circuit Court of Appeals for the Ninth Circuit is erroneous, prays that a Writ of Certiorari may be issued out of and under the seal of this Court directed to the said United States Circuit Court of Appeals for the Ninth Circuit, as provided by law, to the end that the said case may be reviewed and determined, and that upon final consideration thereof the judgment of the said United States Circuit Court of Appeals for the Ninth Circuit may be reversed with such directions as to this Court may seem proper and in conformity with law.

Dated: September 10th, 1931.

Respectfully submitted,

RAY T. COUGHLIN

EUGENE S. SELVAGE

CLIFFORD A. RUSSELL

Attorneys for Petitioner.

We, Raymond T. Coughlin, Eugene S. Selvage, and Clifford A. Russell, attorneys for the within named petitioner, do hereby certify that in our judgment the foregoing petition is well founded and that it is not interposed for the purpose of delay.

RAYMOND T. COUGHLIN

EUGENE S. SELVAGE

CLIFFORD A. RUSSELL

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1931

No.....

JAMES DUNN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To The United States Circuit Court of Appeals,
For the Ninth Circuit.

OFFICIAL REPORT OF THE OPINION DELIVERED IN THE COURT BELOW.

The judgment of the trial court was entered on July 25th, 1930.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, written by the Honorable Curtis Wilbur, Circuit Judge, was entered and filed on June 8, 1931, and is cited in the Transcript of Record which is filed herewith. This opinion has not as yet been reported.

The petition for rehearing was filed June 27th, 1931, and was denied July 22nd, 1931, as shown by the transcript of record, filed herewith.

GROUND UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The statute under which the jurisdiction of this Honorable Court is invoked, is Section 240 Judicial Code, 28 U. S. A., Sec. 347.

CONCISE STATEMENT OF THE CASE.

The petitioner, hereinafter referred to as "defendant," is the owner of premises in the City of Eureka, County of Humboldt, State of California. The premises consist of a room fronting on one of the main streets of the town, containing fishing tackle, sporting goods, soft drinks, with a larger room in the rear containing pool tables.

On the 26th day of June, 1930, two Federal Prohibi-

tion Agents visited the premises. According to their testimony they purchased from defendant in the rear room, five drinks of whiskey and one drink of beer, for which they paid $1.50.

Subsequently the defendant was charged by indictment containing three counts with violating the Jones-Stalker Act.

Under the first count the defendant was charged with maintaining on the 4th day of July, 1930, a common nuisance at the place described above, by then and there keeping for sale at said place certain intoxicating liquor fit for beverage purposes, to-wit: Five drinks of whiskey and one drink of beer.

Under the second and third counts defendant was charged with the possession and sale, respectively, of the same alleged intoxicants.

Upon the trial the Government rested its case upon the testimony of the two prohibition agents, together with a stipulation of counsel that the defendant was the owner of the premises in question.

The defendant denied absolutely that he sold any liquor to the agents on the 26th day of June, 1930, or at any other time, and alleged that he had never seen either of them until July 4th, 1930, the date of his arrest. He stated that on the 26th day of June, 1930, he was at his ranch

and did not return to the premises in question until after the alleged sale.

The trial court gave the following instruction:

> "The familiar rule of the civil law that a person is held to be responsible for the act of an agent employed by him when the act is done in the course of the agency had and in furtherance of it is equally applicable in the criminal law. When an indictment charges a defendant with crime it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the act was committed in the course of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case."

The jury found the defendant not guilty of *possessing* said five drinks of whiskey and one drink of beer and not guilty of the *sale* of said liquor, but convicted the defendant on the first count of maintaining a common nuisance.

Upon appeal, defendant in his brief and in the oral argument before said Circuit Court, contended that the sale of liquor on the 26th day of June, 1930, standing of itself was not sufficient to justify the verdict of guilty on the nuisance count, particularly when the indictment set forth the maintenance of the nuisance on the 4th day

of July, 1930, and the evidence showed that the officers visited the premises on the latter date and found no liquor.

Upon appeal, defendant also contended that there was an utter lack of proof to show knowledge on the part of defendant that any unknown agent was selling liquor, and that the trial court in giving the instruction quoted above, erred in not advising the jury that the principal must have knowledge of or consent to the alleged violation.

Upon appeal, defendant also called the attention of the Appellate Court to the verdict of the jury, which petitioner contends is hopelessly inconsistent. The Appellate Court found the evidence as to nuisance sufficient to sustain the conviction without particularly disposing of defendant's many specifications of error upon the point.

The defendant here specifies in detail the following errors upon which he relies, together with arguments thereon, viz:

ERROR NO. I.

The Appellate Court erred in holding that the single sale of liquor on the 26th day of June, 1930, was sufficient to justify the verdict of guilty of maintaining a common nuisance, especially where the indictment set forth the maintenance of the nuisance on the 4th day of July, 1930.

ARGUMENT UPON ERROR NO. I.

A period of eight days elapsed between the two visits of the various government officers. No evidence of any sort was introduced on behalf of the government to show the continuation of the nuisance.

The law is clear that a common nuisance implies a continuity of violations and that a single sale with no circumstances warranting the inference that the place where the sale is made is maintained for any of the unlawful purposes denounced by the Statutes, is insufficient to sustain a conviction for maintaining a common nuisance. See to this effect,

Fisher vs. *United States,* 32 Fed. 2nd, 602 at 604.

See also: *Barker* vs. *United States,* 289 Fed. 249, where it is stated by the court on page 250:

> "That if the evidence be confined to a single sale with no evidence of other violations, or habitual sales, and likewise no evidence upon which such acts may reasonably be deducted, the penalties provided in the Act for unlawful sale should alone apply."

In the case last cited there was a sale and also a considerable quantity of intoxicating liquor found in the possession of the defendant.

In the case at bar there was no evidence other than the sale of said six drinks. No liquor was found upon

the premises and there were no facts presented tending to show any habitual violation.

See also: *Munsey* vs. *United States,* 289 Fed. 780, where it is stated in the syllabus:

> "Evidence of the sale of a pint of whiskey by defendant at her place of residence held insufficient to justify a conviction for maintaining a nuisance, under National Prohibition Act, Title 2, Subdivision 21, where no other liquor was found on her person or premises."

The presumption of innocence must prevail and it must be conceded that the nuisance, if any, which existed on the 26th day of June, was abated before the 4th day of July.

ERROR NO II.

The Appellate Court erred in not holding as prejudicial the instruction of the trial court upon the question of agency. The Court instructed the jury,

> "It is sufficient for the government to prove that the act was committed by an agent of the defendant, and committed in the course of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case."

ARGUMENT UPON ERROR NO. II.

It is the contention of defendant that before an owner or proprietor can be found guilty of maintaining a nuisance it must be shown that he had knowledge that intoxicating liquor was being kept for sale upon the premises.

This instruction directs the jury to find the defendant guilty in the event an agent of defendant made the sale in question even though the defendant may have known nothing about it; that all the Government had to do was to prove that the act complained of was committed by an agent of the defendant in the course of the agency. We do not believe this to be the law.

See *Tucker, et al.* vs. *United States,* 299 Federal 235, where it is held:

> "There is no question of master and servant among wrongdoers."

See *Dandrea* vs. *United States,* 7 Federal 2nd 861, where it is stated in the syllabus:

> "Evidence on prosecution for sale of liquor by another held insufficient for conviction on theory of defendant being proprietor of place, there being lacking substantial evidence that he was proprietor at the time of sale, *as well as that the sale was made with his knowledge and consent, or on his behalf and as part of his business, and under such circumstances that he must be held to know that such sales were being made.*"

There was no evidence whatsoever produced by the Government in the case at bar to the effect that an agent of defendant made the sale of said six drinks, or that any agent of defendant possessed or kept liquor upon said premises for sale, or that defendant had knowledge of any sale by an agent or consented thereto, or that any sale of liquor was made, or that any liquor was kept, by an agent upon said premises under such circumstances that the defendant must be held to have knowledge thereof. Further, we contend, this case did not involve the question of agency, and it was error to instruct upon an issue not raised by the issues or the evidence.

The defendant did not make said sale of said six drinks and the jury by its verdict so found. The question therefore presented is, can the jury "guess" that the sale may have been made by an agent of defendant?

Nowhere in this instruction did the trial court advise the jury that the principal must have knowledge of or consent to the alleged violation. If liquor were sold upon the premises without the knowledge or consent of Dunn, he could not be held as an aider, abettor or principal. The mere fact of ownership of the premises is not sufficient to justify his conviction upon the nuisance count.

The Apellate Court in its opinion, page 3, said: "The verdict of the jury on the first count shows that they

are satisfied beyond a reasonable doubt that the premises were kept and maintained and liquor was there *possessed* for the purposes of illegal sale, and while they are not able to say beyond a reasonable doubt that the actual sale was made by an authorized agent of appellant, they were convinced that the appellant kept the liquor there for the purpose of sale."

How can the reasoning of the Appellate Court that "liquor was there possessed for purposes of illegal sale" be reconciled by the verdict of the jury that liquor was not possessed there.

Upon what theory under the facts as adduced could the jury be convinced that the appellant kept the liquor there for the purpose of sale, when the jury said the defendant did not possess the liquor in question in the premises described in the indictment.

The case of *Anderson* vs. *United States,* 31 Fed. (2nd) 436, cited by the Appellate Court in its decision relates to the distinction between conspiracy and the substantive offense. A person may be guilty of conspiracy even though he does not actively participate in any of the overt acts set forth in the pleading or proved in the trial. When he joins the conspiracy he becomes legally responsible for all acts done by his co-conspirators in furtherance of the conspiracy. There is no difficulty in reconciling these apparently inconsistent verdicts.

But in the instant case to apply the ruling in the *Anderson* case "the verdict would not be reversed if it were supported by the evidence," where is the supporting evidence that the unknown person was an agent of the Defendant, selling liquor with the knowledge or consent of the Defendant. If such evidence cannot be found then the verdict of the jury on the nuisance count must be reversed.

The Appellate Court concedes by the foregoing language that the jury were not able to say beyond a reasonable doubt that the actual sale was made by an authorized agent of appellant. The person having the possession of the liquor intended for sale, in order to sustain the conviction as against this defendant, must have been an authorized agent of appellant. If the jury could not say that this unknown man who made the sale was authorized by Dunn to make the sale how could they say that this unknown person was authorized by Dunn to keep the liquor there for the purpose of sale, particularly when the jury further said this unknown agent did not possess any liquor.

The Appellate Court says "The effect of the verdict is that the jury had a reasonable doubt as to whether or not the person who sold the liquor at the time and place in question was acting as the agent for and under the authority of appellant." (Page 3).

If such is the case, how can the verdict of guilty on

the nuisance count be sustained, for the sale must have been made by an agent of the defendant, otherwise there is no nuisance.

To reconcile the verdict of the jury with the proof, one of two theories must be adopted, viz:

(a) Either Defendant made the sale as contended by the prosecution or

(b) The sale was made by an agent of the Defendant during his absence.

The first theory must fall because it is hopelessly inconsistent with the finding of the jury that defendant did not make the sale and did not possess the liquor. If the defendant neither sold nor possessed said six drinks, then there is positively no evidence upon which a conviction can stand.

The second theory also must fall because there is no evidence that there was any sale made by any agent of the defendant or any person acting under his authority.

ERROR NO. III.

That the verdict convicting the defendant and petitioner of maintaining a nuisance and acquitting him of possession and sale is inconsistent.

ARGUMENT UPON ERROR NO. III.

As repeatedly heretofore mentioned, the evidence as produced by the Government was confined to a sale of six drinks purported to have been made by defendant on the 26th day of June, 1930, to two Government agents. There was no evidence of any other violations of the National Prohibition Act. If the defendant is not guilty of the possession or sale of said drinks how, in the absence of other evidence, could he logically be guilty of maintaining a nuisance?

We understand that there is a conflict of authority with regard to inconsistent verdicts as set forth in *Lancaster* vs. *United States,* 26 Federal 2nd, 773, and that no decision directly upon this question has been made by your Honorable Court.

Upon this question we refer to *Murphy* vs. *United States,* 18 Federal 509 (8th Circuit), where it is stated in the syllabus:

> "One cannot be convicted of maintaining a nuisance under the National Prohibition Act on evidence of sale of liquor of which sale he is under another count in the same indictment acquitted; the acquittal removing such sale from consideration as an element of the nuisance charged."

See also *Boyle* vs. *United States* (8th Circuit), 22 Federal (2d) where it is held on page 548:

"That the conviction will not be allowed to stand, unless the verdict of conviction is supported by evidence other than the facts pleaded in support of the counts upon which acquittal has been had. This is the view adopted in this circuit, and apparently in the Third."

Citing

Peru vs. *U. S.*, 4 Fed. (2d) 881;
Murphy vs. *U. S.*, 18 Fed. (2d) 509;
John Hohenadal Co. vs. *U. S.*, 295 Fed. 489 (C. C. A. 3)

In *Soper* vs. *United States*, 27 Federal (2d) (9th Circuit), the Court referred to the question of inconsistent verdicts but did not make a direct decision upon the subject, merely holding in substance that a fiction would not operate to create an inconsistency, and that to so hold would be to extend the ruling of the Third and Eighth Circuits beyond the reasons put forth in its support by the Courts.

In *Hessee* vs. *United States*, 28 Federal (2d) 770 (9th Circuit), the Court stated that there was no inconsistency between the unlawful sale of intoxicating liquor and the acquittal on a count charging possession of the liquor, and the Court again stated that it was not found necessary to adopt or approve either rule.

In *United States* vs. *Anderson*, 31 Federal (2d) 436 (9th Circuit) the Court again referred to this question

but held that in the particular case then under consideration, it was not necessary to determine the true rule in the Ninth Circuit.

We feel that the rule as adopted in the Third and Eighth Circuits is the most logical and should be adopted by your Honorable Court.

May we refer to *Speiller* vs. *United States,* 31 Federal (2d) 682 (3rd Circuit), where it is stated in the syllabus:

> "Where there is an acquittal on one count of the indictment and conviction on another count charging the same crime, conviction will not be allowed to stand, unless supported by evidence other than that on which acquittal was based."

The attempt of the Appellate Court in the instant case to reconcile this inconsistency by resorting to the fiction of an unknown agent where there is absolutely no proof of any agency in the record and explaining the verdict of the jury upon that ground is clearly error as heretofore shown in the argument on error No. II herein.

Clearly the evidence here all relates to the same transaction. The Appellate Court in its opinion (page 5) says:

> "The fact that the appellant interposed an alibi and thus raised a clear distinction as to the evidence to support the charges in the three counts of the indictment, together with his admitted ownership of

the place in which it was charged that the common nuisance was maintained and the inferences with relation thereto resulting from the readiness with which intoxicating liquor was produced and sold in such place upon the request of four strangers, sufficiently differentiated the evidence as to the separate counts as to require an affirmance even under the rule most favorable to defendants as to inconsistent verdicts."

We do not believe that this portion of said opinion is supported by the record. The Government claimed that the defendant personally made the sale of the alleged intoxicants. The defendant denied the sale and the jury found that defendant neither made the sale nor possessed any intoxicating liquor. Therefore, even if defendant had been in said premises as contended by the Government, he could not be guilty of maintaining a nuisance because the jury found that he neither sold nor possessed liquor.

The defendant and a number of witnesses testified that he was at his ranch on the day in question and returned to his place of business about 8 o'clock P. M., which was a half hour after the Federal officers had purchased the drinks in question. There was not a line of evidence showing that any agent of defendant made the sale, or possessed liquor, or that any agent violated the law in any respect. The only evidence connecting defendant with the premises was the stipulation of counsel to the effect that defendant was the owner. Even

if the jury is to be permitted to guess that an agent of defendant made said sale, still a conviction cannot stand without evidence showing knowledge on the part of defendant or that he consented to the alleged violation. Certainly a conviction cannot stand on the mere stipulation of ownership alone.

CONCLUSION.

The errors of the Trial Court and the Circuit Court of Appeals set forth in the petition are serious when it is considered that a prison sentence has been imposed upon defendant after the jury has found that he neither made the sale in question or possessed any prohibited liquor. In addition to presenting a record showing an unmistakable miscarriage of justice, this case also presents a conflict of authority among the Circuit Courts upon the question of inconsistent verdicts.

We respectfully submit that this conflict should be determined by your Honorable Court.

For the reasons hereinabove set forth, we ask this Honorable Court to grant the petition for a writ of Certiorari filed herewith.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 393

JAMES DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury will be found at pages 50–57 of the record. The opinion of the Circuit Court of Appeals (R. 80–88) is reported in 50 F. (2d) 779.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1931 (R. 89), and rehearing denied July 22, 1931 (R. 90). The petition for certiorari was filed September 21, 1931. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to justify petitioner's conviction of maintaining a common nuisance in violation of the National Prohibition Act.

2. Whether the District Court erred in its instruction to the jury on the subject of agency.

3. Whether the petitioner's acquittal on the second and third counts of the indictment rendered his conviction on the first count illegal.

STATEMENT

Petitioner was indicted on three counts. The first count charged that on July 4, 1930, petitioner had maintained a common nuisance upon certain premises by there keeping for sale five drinks of whiskey and one drink of beer; the second that at the same time and place he had unlawfully possessed the same liquor, and the third that on June 26, 1930, he had unlawfully sold on the same premises "intoxicating liquor fit for beverage purposes, to wit: five drinks of whiskey and one drink of beer." (R. 1–2.) Following a trial the jury returned a verdict finding petitioner guilty on the first count and not guilty on the second and third counts. (R. 57.) He was sentenced to imprisonment for one year and to pay a fine of $500. (R. 58.) Upon appeal the judgment was affirmed by the Circuit Court of Appeals (R. 89), which thereafter denied a petition for rehearing (R. 90).

To establish the charges contained in the indictment the Government at the trial called as witnesses Federal Prohibition Agents Osborne and Beam. Osborne testified in substance as follows: At about 7.30 o'clock p. m. on June 26, 1930, the witness, accompanied by Agent Beam and two men unknown to them, visited the premises at 301 Second Street, Eureka, California, which consisted of a room fronting on Second Street in which fishing tackle, sporting goods, cigars, and soft drinks were kept for sale, and a larger room in the rear in which there were pool tables and a bar. Passing through the front room the party entered the rear room, where the witness observed the defendant standing behind the bar. As they walked into this room one of the men with the officers said "Hello, Jim." The party thereupon ordered "three whiskeys and one beer," which were served to them by the defendant. The witness had no doubt that the defendant was the man who served the drinks. The witness was able to tell whiskey by the taste and knew that what was served to him was whiskey. He paid the defendant $1.00 for the four drinks. Shortly thereafter Agent Beam paid fifty cents for two more drinks, one of which was consumed by him and the other by one of the men who accompanied the officers into the place. (R. 17.)

Osborne's testimony was corroborated by that of Agent Beam, who further testified that upon being

paid by Osborne for the first drinks served the defendant rang up the amount on the cash register. (R. 22–24.)

On cross-examination both officers stated that in notes made by them shortly after leaving the premises they had described the defendant as having a missing tooth in his upper jaw, but that they had observed at the trial that he had no missing tooth but a space between two teeth. (R. 18–20, 24–25.)

Taking the stand in his own behalf, the defendant testified that he was the owner of the premises in question; that he was not there at 7.30 o'clock on the evening of June 26, 1930; that he had gone to his ranch at Blocksburg that day and had not returned to his place of business in Eureka until some time between 8.00 and 8.30 o'clock in the evening; that he did not see Agent Osborne and Agent Beam that night or at any other time, so far as he knew, until July 4, 1930, when he saw Agent Osborne. (R. 26.) On cross-examination he stated that he was accompanied on his trip to the ranch by a Mrs. Classen and her child; that in the front room of his place of business he had a cigar store and in the back room two pool tables, four card tables, "and soft drinks of all kinds"; that he had whiskey glasses there "to serve bitters"; that he sold soft drinks at the counter in both the front and back rooms. (R. 27–33.)

Mrs. Florence Classen, called as a witness for the defense, testified that she had been housekeeper for

the defendant since 1926; that on June 26, 1930, she and her child had accompanied the defendant to his ranch, and that they had left the ranch with him about 4.00 o'clock in the afternoon and had arrived in Eureka about 8.00 o'clock. (R. 33–36.)

The defense also called Joe Dunn, who testified that he was a brother of the defendant and was employed by him at the premises in question; that on the evening of June 26, 1930, the defendant was in the place a short time; that the witness did not know the exact time the defendant was there but would judge that it was between 7.00 and 8.00 o'clock; that the defendant did not work behind the bar at any time that evening, and that the witness was there from 6.00 o'clock until midnight of that day and did not see Agent Osborne or Agent Beam or serve them any drinks. (R. 36–37.) The witness further testified that he was in the place on the evening of July 4, 1930, at which time he was placed under arrest after an agent who read a John Doe warrant to him had asked whether he had a tooth missing; that the defendant came in while the agents were there and said, "I guess I am the man you are looking for"; whereupon the agents said that they would have to hold both until they were identified, and that Agent Osborne later appeared and identified the defendant as the man to be arrested. (R. 37–38.)

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION OF MAINTAINING A COMMON NUISANCE

Petitioner first contends that if the evidence showed that he was maintaining a common nuisance on the premises in question, it showed the maintenance of such nuisance on June 26, 1930, and not on July 4, 1930, the date charged in the indictment, and that the District Court erred, therefore, in denying motions for a directed verdict based on this ground. (R. 25–26, 47, 48.) We submit that this variance between the proof and the indictment was immaterial. It is well settled that unless a particular day is made material by the statute creating the offense, the evidence need show only that the offense was committed at some time within the period of the statute of limitations. *Ledbetter* v. *United States,* 170 U. S. 606, 612.

Petitioner next asserts that the evidence was insufficient to establish the offense of maintaining a common nuisance, because it disclosed only a single sale of liquor. The contention was not raised in the motions for a directed verdict (R. 25–26, 47, 48), but was apparently made for the first time by motion in arrest of judgment (R. 13–14). We believe that it was raised too late, but in any event the question presented by the motion in arrest of judgment was one addressed to the discretion of the trial court and can not be reviewed if there was any evi-

dence proper to go to the jury in support of the verdict. See *Crumpton* v. *United States*, 138 U. S. 361, 362–363; *Moore* v. *United States*, 150 U. S. 57, 61–62. We submit that there was sufficient evidence to support the verdict on the nuisance count. Even if the sale by petitioner of the four drinks of liquor paid for by Agent Osborne, followed by the sale by him of the two drinks paid for by Agent Beam, may be regarded as constituting a single sale of liquor, nevertheless the circumstances under which the sale was made, that is, the readiness with which the petitioner, upon being greeted by name by one of the party, furnished the liquor in whiskey glasses across the bar in a rear room, coupled with his ringing up the amount of the sale on the cash register (R. 17, 23–24), were ample, we think, to justify the jury in concluding that the sale was but an instance of a practice which was being regularly carried on in that room. That a single sale of liquor may be made under such circumstances as to warrant a conviction of maintaining a common nuisance is settled. *Fisher* v. *United States*, 32 F. (2d) 602, 604 (C. C. A. 4th), and cases therein cited. Petitioner refers to no decision in conflict.

II

THE INSTRUCTION ON THE SUBJECT OF AGENCY IS NOT OPEN TO THE OBJECTIONS ASSERTED BY PETITIONER

In the course of its charge to the jury the District Court gave the following instruction (R. 54):

> The familiar rule of the civil law that a person is held to be responsible for the act

> of an agent employed by him when the act is done in the course of the agency and in furtherance of it is equally applicable in the criminal law. When an indictment charges a defendant with crime it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the Act was committed by an agent of the defendant and committed in the course of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case.

Petitioner attacks this instruction on two grounds, the first being that there was no evidence that any agent of the petitioner sold liquor on the premises and the charge tended, therefore, to confuse the jurors as to the issues to be decided by them.

It is true that the Government's witnesses testified that the sales of liquor were made by the petitioner himself rather than by an agent. But the evidence introduced by the defense to show that the petitioner was not present when the sales were made might well have led the jury to conclude that, although the Government agents truthfully testified that sales of liquor were made on the premises, they were mistaken in their identification of the bar-

tender. As the circumstances under which the sales were made were such as to justify the jury in finding that, if not made by the petitioner, they were made by one employed by him to make sales of that character, an instruction by the court regarding the petitioner's responsibility in that event was clearly justified.

Petitioner's second ground of attack upon the instruction is that it constituted an incorrect statement of the law, in that it failed to charge that the principal must have knowledge of the act of the agent in order to be held accountable therefor. If this contention means that the principal in order to be liable criminally for the acts of an agent must have specific knowledge of each particular act, we submit that it is a too narrow interpretation of the law. Indeed, the quotation from *Dandrea* v. *United States,* 7 F. (2d) 861, 862 (C. C. A. 8th), which petitioner gives on page 18 of his brief, specifically states that criminal liability attaches to the principal where sales are made "on his behalf and as part of his business, and under such circumstances that he must be held to know that such sales were being made." The instruction to which petitioner objects not only charges that the act must have been "committed in the course of the agency and in furtherance of it," which obviously means that the act must have been done pursuant to authority conferred by the principal, but it was followed imme-

diately by a paragraph of the charge, which in referring to Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) instructed as follows (R. 55):

> I instruct you, Gentlemen, that it is the law that "Whoever directly commits any act constituting an offense defined in any law of the United States or aids or abets or procures its commission is a principal." Aid means to help, support, assist, one who helps or promotes in doing something. Abet means to instigate or encourage by aid or countenance; to contribute as an assistant or instigator in the commission of an offense. *The owner of an establishment or business who has knowledge that an employee is maintaining a liquor nuisance therein is an aider and abettor and may be convicted as a principal.* (Italics ours.)

In addition, the trial court, in ruling upon petitioner's exception to the instruction, specifically stated (R. 56):

> The COURT. As to whether or not the defendant here was maintaining a nuisance, I take it that it is the law that if he owns these premises and he knows some one was selling liquor there he would be responsible for the act of that agent, whoever that would be.

We submit that petitioner's contention is without merit, and that upon the charge as a whole the jury could not have been under a misapprehension as to the law applicable to the facts.

III

PETITIONER'S ACQUITTAL ON THE SECOND AND THIRD COUNTS DID NOT RENDER ILLEGAL HIS CONVICTION ON THE FIRST COUNT

Petitioner's final contention is that his conviction on the charge of maintaining a common nuisance was inconsistent with his acquittal on the charges of having possessed and sold liquor, and that the decision of the court below is in conflict with decisions of other Circuit Courts of Appeals holding that a conviction will be set aside where it is inconsistent with an acquittal on another count of the same indictment.

The court below recognized in this and the earlier cases which it cites (see e. g. *Lambert* v. *United States*, 26 F. (2d) 773) that there is a diversity of opinion among some of the circuits as to the effect of an inconsistent verdict, where there are different counts in the same indictment or information (R. 82), but it held that neither line of decisions applied in the instant case because the verdict was not inconsistent. It said (R. 83–84, 86):

> In the case at bar there is no legal inconsistency between an acquittal upon the charges of sale and possession and the conviction upon a charge of nuisance. The inconsistency, if any, arises from the fact that the evidence on behalf of the Government with reference to the three offenses is identical, and it is illogical for a jury to accept the testimony of these witnesses on one count

and reject them on the other two. But this apparent inconsistency is largely dispelled by a consideration of the evidence offered by the defense. This evidence was calculated to, and no doubt did, raise a reasonable doubt in the minds of the jury as to whether or not the defendant personally sold the liquor to the Government agents at the time and place in question. In view of the fact that the jury was instructed that the appellant might act through agents and employees and was instructed in effect that if he so acted through an agent or employee in possession or sale of liquor he was guilty as a principal of the illegal sale and illegal possession, the effect of the verdict is that the jury had a reasonable doubt as to whether or not the person who sold the liquor at the time and place in question was acting as the agent for and under the authority of the appellant. The evidence showed that appellant had several employees, including his brother, operating his place of business. The verdict of the jury on the first count shows that they are satisfied beyond a reasonable doubt that the premises were kept and maintained and liquor was there possessed for purposes of illegal sale, and while they are not able to say beyond a reasonable doubt that the actual sale was made by an authorized agent of the appellant, they were convinced that the appellant kept the liquor there for the purpose of sale. As pointed out in *U. S. v. Anderson*, *supra* (31 F. (2d)

436), it is not the province of this court to try to determine the basis for the verdict of the jury. Under our system of law the jury is the sole judge of the facts and the credibility of witnesses and their verdicts are not to be overturned because them seem illogical.

* * * * *

The fact that the appellant interposed an alibi and thus raised a clear distinction as to the evidence to support the charges in the three counts of the indictment, together with his admitted ownership of the place in which it was charged that the common nuisance was maintained and the inferences with relation thereto resulting from the readiness with which intoxicating liquor was produced and sold in such place upon the request of four strangers, sufficiently differentiated the evidence as to the separate counts as to require an affirmance even under the rule most favorable to defendants as to inconsistent verdicts.

Obviously, in reaching a verdict of guilty on the first count it was not necessary for the jury to identify the bartender either as the defendant or as one regularly employed on the premises, or, perchance, one of the patrons of the place who might have stepped behind the bar to take the bartender's place. The evidence clearly established that liquor was there for sale, that it was sold in the ordinary course of business, and that the proceeds of the sales went into the cash register. The defendant was the proprietor of this place. Upon the

evidence the jury was justified in finding the defendant guilty of maintaining the place for such purposes without attempting to identify the particular individual who made the sale. On the other hand in considering the counts charging possession and sale, it was necessary for the jury to find either that the defendant himself made the sale or that the sale was made by his authorized agent. Thus, the evidence supported conviction on the first count for maintaining a nuisance, even though the jury was unable to identify the person who actually made the sale.

The cases upon which petitioner relies are all distinguishable because conviction on one count necessarily depended on the evidence which the jury did not accept in reaching verdicts of acquittal on other counts. The conflict of decisions to which the court below referred and upon which the petitioner relies comes merely to this: That some courts have held that evidence showing sales of which the defendant has been acquitted can not be relied upon to support conviction of maintaining a nuisance, whereas other courts have held that even if there is no rational way to reconcile such verdicts the verdict of guilty will stand. Obviously upon this record it was not only possible to reconcile the verdict of the jury by a rational consideration of the evidence, but there was, in fact, no inconsistency between a finding of guilty upon the first count and the acquittal upon the other two counts. Under these circumstances the court below

was clearly right in pointing out that neither line of the conflicting decisions could have application to this case, because the verdict was not in fact inconsistent. It follows that no conflict of decisions is presented.

CONCLUSION

The questions presented are of no general importance, and have application only to the particular state of the proofs in this case. There is no such conflict of decisions arising in this case as requires the exercise of this Court's supervisory power. The petition, accordingly, should be denied.

Respectfully submitted.

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No. 393

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 393

JAMES DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury will be found at pages 50–57 of the record. The opinion of the Circuit Court of Appeals (R. 80–88) is reported in 50 F. (2d) 779.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1931 (R. 89), and rehearing denied July 22, 1931 (R. 90). The petition for certiorari was filed September 21, 1931, and was

granted November 2, 1931. (R. 93.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to justify petitioner's conviction of maintaining a common nuisance in violation of the National Prohibition Act.

2. Whether the District Court erred in its instruction to the jury on the subject of agency.

3. Whether the petitioner's acquittal on the second and third counts of the indictment rendered his conviction on the first count illegal.

STATEMENT

Petitioner was indicted on three counts. The first count charged that on July 4, 1930, petitioner maintained a common nuisance upon certain premises by there keeping for sale five drinks of whiskey and one drink of beer; the second, that at the same time and place he unlawfully possessed the same liquor, and the third, that on June 26, 1930, he had unlawfully sold on the same premises "intoxicating liquor fit for beverage purposes, to wit, five drinks of whiskey and one drink of beer." (R. 1–2.) Following a trial the jury returned a verdict of guilty on the first count and not guilty on the second and third counts. (R. 57.) Petitioner was sentenced to imprisonment for one year and to pay

a fine of $500. (R. 58.) Upon appeal the judgment was affirmed by the Circuit Court of Appeals (R. 89), which thereafter denied a petition for rehearing (R. 90).

The Government called as witnesses at the trial Federal Prohibition Agents Osborne and Beam. Osborne testified in substance as follows: At about 7.30 o'clock p. m. on June 26, 1930, the witness, accompanied by Agent Beam and two men unknown to them, visited the premises in question, which consisted of a room fronting on Second Street in which fishing tackle, sporting goods, cigars, and soft drinks were kept for sale, and a larger room in the rear in which there were pool tables and a bar. The party entered the rear room where the witness observed the defendant standing behind the bar. As they walked into this room one of the men with the officers said, "Hello, Jim." The party thereupon ordered "three whiskeys and one beer," which were served to them by the defendant. The witness had no doubt that the defendant was the man who served the drinks. He paid the defendant $1.00 for the four drinks. Shortly thereafter Agent Beam paid fifty cents for two more drinks, one of which was consumed by him and the other by one of the men who accompanied the officers into the place. (R. 17.)

Osborne's testimony was corroborated by that of Agent Beam, who further testified that upon being paid by Osborne for the first drinks served the de-

fendant rang up the amount on the cash register. (R. 22–24.)

On cross-examination both officers stated that in notes made by them shortly after leaving the premises they had described the defendant as having a missing tooth in his upper jaw, but that they had observed at the trial that he had no missing tooth but a space between two teeth. (R. 18–20, 24–25.)

Taking the stand in his own behalf, the defendant testified that he was the owner of the premises in question; that he was not there at 7.30 o'clock on the evening of June 26, 1930; that he had gone to his ranch at Blocksburg that day and had not returned to his place of business in Eureka until some time between 8.00 and 8.30 o'clock in the evening; that he did not see Agent Osborne and Agent Beam that night or at any other time, so far as he knew, until July 4, 1930, when he saw Agent Osborne. (R. 26.) On cross-examination he stated that he was accompanied on his trip to the ranch by a Mrs. Classen and her child; that in the front room of his place of business he had a cigar store and in the back room two pool tables, four card tables, "and soft drinks of all kinds"; that he had whiskey glasses there "to serve bitters"; that he sold soft drinks at the counter in both the front and back rooms. (R. 27–33.)

Mrs. Florence Classen, called as a witness for the defense, testified that she had been housekeeper

for the defendant since 1926; that on June 26, 1930, she and her child had accompanied the defendant to his ranch and that they had left the ranch with him about 4.00 o'clock in the afternoon and had arrived in Eureka about 8.00 o'clock. (R. 33–36.)

The defense also called Joe Dunn, who testified that he was a brother of the defendant and was employed by him at the premises in question; that on the evening of June 26, 1930, the defendant was in the place a short time; that the witness did not know the exact time the defendant was there, but would judge that it was between 7.00 and 8.00 o'clock; that the defendant did not work behind the bar at any time that evening, and that the witness was there from 6.00 o'clock until midnight of that day and did not see Agent Osborne or Agent Beam or serve them any drinks. (R. 36–37.) The witness further testified that he was in the place on the evening of July 4, 1930, at which time he was placed under arrest after an agent who read a John Doe warrant to him had asked whether he had a tooth missing; that the defendant came in while the agents were there and said, "I guess I am the man you are looking for"; whereupon the agents said that they would have to hold both until they were identified, and that Agent Osborne later appeared and identified the defendant as the man to be arrested. (R. 37–38.)

SUMMARY OF ARGUMENT

That the common nuisance was shown to have been maintained by petitioner on June 26, 1930, rather than July 4, 1930, as alleged in the indictment, was an immaterial variance, and the evidence was sufficient to sustain the verdict.

There was no error in the instructions to the jury with reference to the criminal responsibility of a principal for the acts of his agents. The petitioner had offered evidence that he was not present when the liquor was sold. It was, however, stipulated, and the petitioner testified, that he was the proprietor of the premises which were furnished as a bar room, and the jury may well have found that the sales were made, not by the petitioner but by some one else in his behalf or with his permission. In so far as the nuisance count is concerned, the instructions were limited so as to require knowledge on the part of the defendant that some one was selling liquor on his premises. As this was the only count upon which the defendant was convicted, there was no prejudicial error in the charge.

The conviction on the nuisance count was not inconsistent with the acquittal on the possession and sale counts. The circumstances were amply sufficient to sustain a finding of guilt predicated upon the theory that the defendant, being the proprietor of the place, must have had knowledge of the sale of liquor made in the regular course of the business being there conducted. To support conviction on

the nuisance count the jury was not required to find that the person who actually made the sale was in fact the agent of the defendant. If the jury was satisfied that petitioner had knowledge that such sales were being made upon the premises of which he was the proprietor, that was enough. The court so charged and no exception was taken. (R. 57.) Accordingly the jury was quite consistent in concluding that the evidence was not sufficient to establish the identity of this person beyond a reasonable doubt, but that taking all of the circumstances into consideration there was no doubt that the defendant had knowledge of the use to which his property was being put and was therefore guilty of maintaining the nuisance.

But if the verdicts of not guilty on the sale and possession counts should be considered logically irreconcilable with the verdict of guilty on the nuisance count, the verdict of guilty must stand. The general principle is recognized by this Court in *Dealy* v. *United States,* 152 U. S. 539, and *Selvester* v. *United States,* 170 U. S. 262, 267, that each count of an indictment is in effect a separate charge, and a verdict of guilty or not guilty as to it is not responsive to the charge in any other count of the indictment. Upon this principle there is no basis for the doctrine of inconsistency asserted in this case. Furthermore, by the great weight of authority in this country and in England the doctrine is untenable. The power of the jury to bring in a ver-

dict in the teeth of both law and facts (*Horning* v. *District of Columbia,* 254 U. S. 135, 138) emphasizes the importance of disregarding logical inconsistencies as between verdicts of guilty and not guilty upon different counts of an indictment.

The reasoning upon which some courts have held that the acquittal upon one count of an indictment may require the setting aside of a verdict of guilty upon another count of the same indictment, viz., that where the evidence upon which a conviction upon one count is had would as fully support a conviction upon counts upon which there is an acquittal the conviction must be set aside because the act of the jury in acquitting shows that it must have rejected the evidence upon which the conviction was had, is unsound. Under our system the grounds upon which a jury reaches its verdict can not be ascertained, and the assumption that the acquittal shows a rejection of evidence by the jury can only be conjectural. The acquittal may well have resulted from an arbitrary refusal to convict because of leniency or other like motive.

We therefore contend that there is no sound principle of law which requires a conviction on one count to be set aside solely because the jury has failed to convict on another count upon which it could, on the same evidence, have found the defendant guilty.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION OF MAINTAINING A COMMON NUISANCE

The petitioner first contends that if the evidence showed that he was maintaining a common nuisance on the premises in question it showed the maintenance of such nuisance on June 26, 1930, and not on July 4, 1930, the date charged in the indictment, and that the District Court erred, therefore, in denying motions for a directed verdict on this ground. (R. 25–26, 47–48.) But this variance between proof and allegation was quite immaterial. *Ledbetter* v. *United States,* 170 U. S. 606, 612.

The petitioner next asserts that the evidence was insufficient to establish the offense of maintaining a common nuisance because it disclosed only a single sale of liquor. The circumstances under which the four drinks of liquor were purchased by Agent Osborne and two more drinks were purchased by Agent Beam furnish persuasive evidence that the premises were maintained for the sale of liquor over the bar, in the regular course of business. This was shown by the fittings of the place, the presence of a man behind the bar serving whisky in glasses of the kind in which whisky is usually served, the fact that the liquor was at hand, ready to be served to anyone who came to the bar and ordered it, the retail charge of twenty-five cents

a drink, and the deposit of the money in the cash register, obviously operated in the conduct of the business being carried on. (R. 17, 22, 24.) This evidence, we think, was ample to justify the jury in concluding that the sale was but an instance of a practice which was being regularly carried on in this room, of which the defendant was the proprietor. That a single sale of liquor may be made under such circumstances as to warrant a conviction of maintaining a common nuisance is settled in the lower Federal courts. *Fisher* v. *United States*, 32 F. (2d) 602, 604 (C. C. A. 4th), and cases there cited. The petitioner refers to no decision in conflict.

II

THE INSTRUCTION ON THE SUBJECT OF AGENCY IS NOT OPEN TO THE OBJECTIONS ASSERTED BY PETITIONER

In the course of its charge to the jury the District Court gave the following instruction (R. 54):

> The familiar rule of the civil law that a person is held to be responsible for the act of an agent employed by him when the act is done in the course of the agency and in furtherance of it is equally applicable in the criminal law. When an indictment charges a defendant with crime it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the act was committed by an agent of the defendant and committed in the course

> of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case.

Petitioner attacks this instruction on two grounds, the first being that there was no evidence that any agent of the petitioner sold liquor on the premises and the charge tended therefore to confuse the jurors as to the issues to be decided by them.

It is true that the Government's witnesses testified that the sales of liquor were made by the petitioner himself rather than by an agent. But the evidence introduced by the defense to show that the petitioner was not present when the sales were made might well have led the jury to conclude that, although the Government agents truthfully testified that sales of liquor were made on the premises, they were mistaken in their identification of the bartender. As the circumstances under which the sales were made were such as to justify the jury in finding that, if not made by the petitioner, they were made by one employed by him to make sales of that character, an instruction by the court regarding the petitioner's responsibility in that event was clearly justified.

Petitioner's second ground of attack upon the instruction is that it constituted an incorrect statement of the law in that it failed to charge that the principal must have knowledge of the act of the

agent in order to be held accountable therefor. If this contention means that the principal in order to be liable criminally for the acts of an agent must have specific knowledge of each particular act, we submit that such an interpretation of the law is too narrow. Indeed, the quotation from *Dandrea* v. *United States*, 7 F. (2d) 861, 862 (C. C. A. 8th), which petitioner gives on page 18 of his brief, specifically states that criminal liability attaches to the principal where sales are made "on his behalf and as part of his business, and under such circumstances that he must be held to know that such sales were being made." The instruction to which petitioner objects not only charges that the act must have been committed "in the course of the agency and in furtherance of it" (R. 54), which obviously means that the act must have been done pursuant to authority conferred by the principal, but it was followed immediately by a paragraph of the charge which referred to Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) as follows (R. 55):

> I instruct you, Gentlemen, that it is the law that "Whoever directly commits any act constituting an offense defined in any law of the United States or aids or abets or procures its commission is a principal." Aid means to help, support, assist, one who helps or promotes in doing something. Abet means to instigate or encourage by aid or countenance; to contribute as an assistant or instigator in the commission of an offense.

> *The owner of an establishment or business who has knowledge that an employee is maintaining a liquor nuisance therein is an aider and abettor and may be convicted as a principal.* (Italics ours.)

In addition, the trial court, in ruling upon petitioner's exception to the instruction, specifically stated (R. 56–57):

> As to whether or not the defendant here was maintaining a nuisance, I take it that it is the law that if he owns these premises and he knows some one was selling liquor there he would be responsible for the act of that agent, whoever that would be.

Thus, in so far as the nuisance count is concerned, the instructions were limited so as to require a finding that defendant knew that sales of liquor were being made on the premises of which he was the proprietor. As this was the only count upon which the petitioner was convicted the jury could not have been under any misapprehension as to the elements of the crime of which he was found guilty.

III

THE JURY'S VERDICT OF GUILTY ON THE FIRST COUNT IS NOT AFFECTED BY ITS VERDICTS OF NOT GUILTY ON THE OTHER TWO COUNTS

The petitioner's contention that because he was found not guilty of unlawful possession and sale of the liquor his conviction of maintaining a nuisance

must be set aside is, we contend, without merit, because, as we shall attempt to show, the verdicts were not inconsistent, and because such inconsistency as is claimed by the petitioner would be no ground for setting aside his conviction either upon principle or upon authority.

The petitioner interposed the defense that he was not present, as the Government witnesses testified, when the sales of liquor were made upon the premises of which he was concededly the proprietor. It may well be that the jury concluded that the Government witnesses were mistaken in their identification of the defendant as the man behind the bar, from whom they purchased the liquor. Under these circumstances and pursuant to the instruction of the court, it became necessary, in order to convict the petitioner of unlawful sale and possession, to find that the sale was made by the petitioner's agent. The jury was entirely justified in accepting the testimony of the Government's witnesses that the sales were made, although they believed them mistaken as to the identification of the person behind the bar. This, however, must have left the identity of the person who sold the liquor unknown, and the jury may well have hesitated to find, without any acceptable identification of this person, that he was the agent of the petitioner. But with reference to the nuisance count the issue was quite different. The very last words of the court to the jury,

accepted by petitioner's counsel as a correct statement of the law, were these:

> The COURT. As to whether or not the defendant here was maintaining a nuisance, I take it that it is the law that if he owns these premises and he knows someone is selling liquor there he would be responsible for the act of that agent, whoever that would be.
>
> Mr. RUSSELL [Petitioner's counsel]. We would concede that, but the evidence, and the only evidence is that the sale, if any, was made by Mr. Dunn. There is not any question of agency.
>
> The COURT. I understand your contention. The jury may now retire. (R. 56–57.)

The circumstances disclosed by the evidence were amply sufficient to sustain a finding of guilt on the nuisance count, predicated upon findings that the defendant, being the proprietor of the place, must have had knowledge of the sale of liquor, made in the regular course of the business being conducted there in his behalf. To support conviction on the nuisance count the jury was not required to identify the person who made the sale as an agent of the petitioner, except in the sense, as charged by the court in its closing words to the jury, that the petitioner, being the owner and proprietor of the place, knew that some person was engaged in selling liquor there. Accordingly, we submit, the jury was quite consistent in concluding that the evidence was not

sufficient to establish the identity of the person behind the bar, but that taking all of the circumstances into consideration there was no reasonable doubt that the petitioner had knowledge of the use to which his property was being put, and was therefore guilty of maintaining a nuisance, as charged in the indictment.

In the court below it was concluded that there was no legal inconsistency between the acquittal on charges of sale and possession and the conviction upon the charge of nuisance. This conclusion was reached upon a careful consideration of the evidence and the issues raised for the consideration of the jury, differing with respect to the charge of nuisance and the charges of unlawful possession and sale. The conclusion of the court below was, we submit, correct; but in any event it will hardly be disputed that this conclusion expressed a rational view of the evidence which was clearly open to the jury in considering its verdict upon the several counts of the indictment. In concluding the point, the court below said:

> The fact that the appellant interposed an alibi and thus raised a clear distinction as to the evidence to support the charges in the three counts of the indictment, together with his admitted ownership of the place in which it was charged that the common nuisance was maintained and the inferences with relation thereto resulting from the readiness with which intoxicating liquor was produced and sold in such place upon the request of four

strangers, sufficiently differentiated the evidence as to the separate counts as to require an affirmance even under the rule most favorable to defendants as to inconsistent verdicts. (R. 86.)

But if it should be concluded that upon any rational view of the evidence the verdicts of not guilty on the sale and possession counts must be considered logically irreconcilable with the verdict of guilty on the nuisance count, still, we submit, the verdict of guilty must stand. The general principle recognized by this Court in *Dealy* v. *United States,* 152 U. S. 539, and *Selvester* v. *United States,* 170 U. S. 262, 267, is that each count of an indictment is in effect a separate charge, and a verdict of guilty or not guilty as to it is not responsive to the charge in any other count of the indictment. Here, the indictment, in its separate counts, charged separate and distinct offenses. *Albrecht* v. *United States,* 273 U. S. 1, 11. Upon this principle there can be no basis for the doctrine of inconsistency asserted in this case, and by the great weight of authority, in this country and in England, this doctrine is untenable.

The doctrine has been repudiated by the Circuit Courts of Appeal in the Second, Sixth, and Seventh Circuits, which have held that even if the verdicts on several counts of an indictment appear to be illogical or inconsistent, a conviction on any particular count must nevertheless be sustained, because it is not for the court to attempt to follow the

reasoning of the jury, which may have influenced the rendition of its verdict. See *Marshallo* v. *United States,* 298 Fed. 74, 76 (C. C. A. 2d); *Steckler* v. *United States,* 7 F. (2d) 59, 60 (C. C. A. 2d); *Seiden* v. *United States,* 16 F. (2d) 197, 198 (C. C. A. 2d); *Gozner* v. *United States,* 9 F. (2d) 603 (C. C. A. 6th); *Carrignan* v. *United States,* 290 Fed. 189 (C. C. A. 7th).

The weight of authority generally is in accord with this view.[1]

In conflict with the decisions of the Circuit Courts of Appeal in the Second, Sixth, and Seventh Circuits are certain decisions of the Circuit Courts of Appeal in the Third and Eighth Circuits. See *Hohenadel Brewing Co.* v. *United States,* 295 Fed. 489, 490 (C. C. A. 3d); *Speiller* v. *United States,* 31 F. (2d) 682 (C. C. A. 3d); *Peru* v. *United States,* 4 F. (2d) 881, 884 (C. C. A. 8th); *Murphy* v. *United States,* 18 F. (2d) 509, 511–512 (C. C. A. 8th); *Boyle* v. *United States,* 22 F. (2d) 547, 548–549 (C. C. A. 8th).

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[1] For cases illustrative of the rule see: *Thompson* v. *State,* 177 **Ark.** 1; *People* v. *Edwards,* 72 **Cal.** App. 102; *Holt* v. *People,* 1 Pac. (2d) 921 (Sup. Ct. **Colo.**); *Hathcock* v. *State,* 88 **Ga.** 91; *People* v. *Weaver,* 173 **Ill.** App. 455; *Sichick* v. *State,* 89 **Ind.** App. 132, cf. *Rokvic* v. *State,* 194 Ind. 450; *State* v. *Brown,* 114 **Kan.** 699; *Holmes* v. *State,* 146 **Md.** 420; *Commonwealth* v. *Walsh,* 255 **Mass.** 317, cf. *Commonwealth* v. *Donovan,* 170 Mass. 228 and *Commonwealth* v. *Haskins,* 128 Mass. 60; *State* v. *Ridge,* 275 S. W. 59 (**Mo.** Ct. App.); *State* v. *Daly,* 77 **Mont.** 387; *Weinecke* v. *State,* 34 **Neb.** 14; *People* v. *Haupt,* 247 **N. Y.** 369; *State* v. *Brown,* 198 **N. C.** 41; *Browning* v. *State,* 120 **Ohio** St. 62; *Latham* v. *Queen,* 5 **B. & S.** 635 (**Eng.**)

We submit that the decisions in the Second, Sixth, and Seventh Circuits declare the true rule, and that this rule is supported in principle by the decisions of this Court in *Dealy* v. *United States, supra,* and *Selvester* v. *United States, supra.* The reasoning of the Circuit Courts of Appeal for the Third and Eighth Circuits in adopting the contrary rule is, we contend, unsound. Under our system there is no way of ascertaining the grounds upon which a jury has reached its verdict. The fact that the jury has found the defendant not guilty on one count and guilty upon another, upon evidence which in the judgment of the court would as fully support conviction on each, affords no justification for the assumption that the jury has rejected evidence necessary to support its finding of guilt. How the jury arrives at such a verdict is sheer speculation. In acquitting the defendant it may have disregarded the facts or misunderstood or misapplied the law. It may have considered the evidence sufficient to show guilt of one offense and insufficient to show guilt of the other. It may have acquitted the defendant "in the teeth of both law and facts" (*Horning* v. *United States,* 254 U. S. 135, 138), influenced by motives of sympathy or its own theories of justice. Whatever its motives or reasons may have been in acquitting the defendant, they are not ascertainable, and it should be sufficient that under correct guidance from the court they have unanimously concluded, upon ample evidence, and after a fair trial, that the defendant is

in fact guilty of an offense with which he is charged. Assuming no error in the course of the trial, the only certain test as to the validity of the jury's verdict is the sufficiency of evidence to support the finding of facts which constitute the offense.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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NOVEMBER, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 393.—October Term, 1931.

James Dunn, *vs.* The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 11, 1932.]

Mr. Justice Holmes delivered the opinion of the Court.

The petitioner was indicted in three counts, first, for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, second, for unlawful possession of intoxicating liquor and third, for the unlawful sale of such liquor. The jury acquitted him on the second and third counts, and found him guilty on the first. No question was raised in the courts below with respect to the sufficiency of the indictment on the first count, and no such question has been presented here. The case was tried upon the assumption that the indictment was good as to that count, and in the opinion of the majority, we should make the same assumption.

The defendant says that the evidence did not warrant a conviction and that the verdict on the second and third counts is inconsistent with that upon the first and that for this reason also he is entitled to be discharged. The evidence was the same for all the counts. The defendant owned the establishment where the alleged sale took place. It consisted of a front room where fishing tackle, sporting goods, cigars and soft drinks were sold, and a larger room in the rear with pool tables and a bar. Two prohibition agents and two unknown men walked in and ordered from the defendant three glasses of whiskey and one of beer and were served without further conversation. A little later two more drinks were called for and furnished. The whiskey was served in ordinary whiskey glasses from underneath the bar and the money paid for it, twenty-five cents a glass, was put into

a cash register behind the bar. The testimony, if believed, showed a regular course of business, which manifestly was continuous, *Fisher* v. *United States,* 32 F. (2d) 602, 604, and warranted a verdict of guilty on the nuisance count. The defendant gave evidence that he was elsewhere at the time of the alleged sale and did not make it. He contends that the verdict is inconsistent, since it negatives possession and affirms the nuisance, the proof of the commission of both alleged offenses consisting of identical evidence. The Government says that even though the jury seems to have believed that the defendant was elsewhere at the time of the alleged sale and did not make it, the verdict is not necessarily inconsistent, for some third person, with defendant's knowledge, may have been doing business on the premises, and if so they were a nuisance, and the defendant was guilty although he neither possessed nor sold intoxicating liquors upon them; that whereas the Government's witnesses may have been mistaken in saying that the defendant sold, they may have been right to the extent that someone did, and if that be true the defendant's knowledge could be inferred, this being his place of business and he being habitually present there. It is further argued that it may be inferred that he received the money coming from the sale, and that he knowingly abetted the seller in the acts that created the nuisance on the premises that the defendant controlled.

Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Latham* v. *The Queen,* 5 Best & Smith, 635, 642, 643. *Selvester* v. *United States,* 170 U. S. 262. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in *Steckler* v. *United States,* 7 F. (2d) 59, 60:

"The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they

had no right to exercise, but to which they were disposed through lenity."

Compare *Horning* v. *District of Columbia*, 254 U. S. 135.

That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 393.—October Term, 1931.

James Dunn, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 11, 1932.]

Mr. Justice Butler, dissenting.

The indictment contains three counts and accuses petitioner of violations of the liquor laws. The first is under § 33 and the other two are under § 12 of Title 27, U. S. Code, being, respectively, §§ 21 and 3 of Title II of the National Prohibition Act, 41 Stat. 308, 314. The pertinent words are:

"§ 33. Any . . . building . . . or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this chapter [title], and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor . . .".

"§ 12. No person shall . . . sell . . . or possess any intoxicating liquor except as authorized in this chapter [title] . . .".

The first count cites § 33 and charges that petitioner on the fourth of July, 1930 (the evidence shows that June 26 was meant) "at a place known as No. 301-2d Street, in the City of Eureka . . . did . . . maintain a common nuisance, in then and there knowingly and willfully committing a prohibited and unlawful act of keeping for sale at said place certain intoxicating liquor . . . to wit: five drinks of whiskey and one drink of beer . . .". The second cites § 12 and charges that he then and there committed a prohibited and unlawful act of "possession of the said certain intoxicating liquor". The third cites § 12 and charges that on June 26, 1930, he did then and there knowingly and willfully commit a prohibited and unlawful act of "sale of

certain intoxicating liquor . . . to wit: five drinks of whiskey and one drink of beer".

The nuisance charged is specifically limited to the "keeping for sale" of the six drinks mentioned. The unlawful possession count is limited to the same drinks. The unlawful sale alleged is limited to six drinks. The evidence showed that the same liquor constituted the sole basis of each count.

At the trial it was shown that petitioner owned and carried on business in the place described; that there was a front room where sporting goods, cigars and soft drinks were sold and a back room in which defendant had a bar, pool and card tables and all kinds of soft drinks. The bar was used to wait on customers in that room. There were some one-ounce whiskey glasses which petitioner testified were used to serve bitters.

Two federal prohibition agents testified that about 7:30 o'clock in the afternoon of June 26, 1930, they and two unknown men, whom they referred to as "pick-ups", entered the rear room and found petitioner behind the bar; that one of the agents bought from petitioner "three whiskeys and one beer" and paid him a dollar which he rang up on the cash register; that the other agent bought from him two more drinks of whiskey and that all such liquor was consumed on the premises by the agents and their companions. No other sale was shown. No arrest, search or seizure was then made or attempted. *Marron* v. *United States*, 275 U. S. 192. Eight days later federal officers having a warrant for arrest accompanied by one of the prohibition agents raided the place and arrested petitioner. There was no evidence that any liquor was found. Petitioner testified and introduced other evidence to show that he was absent from Eureka and not in the place until some time between 8:00 and 8:30 o'clock that evening.

The trial court charged:

"The element of nuisance is the keeping of intoxicating liquor for sale. If you find from the evidence that the defendant had in his possession any liquor . . . for the purpose of such sale, then you must find the defendant guilty. . . .

"If you find from the evidence that the defendant unlawfully possessed intoxicating liquor, of course it will be your duty to find him guilty of that charge; . . .

"Of course, if . . . you believe that he is guilty . . . of having sold liquor at his said place of business it will be your duty to find him guilty of that charge. . . .

"When an indictment charges a defendant with crime, it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the act was committed by an agent of the defendant and committed in the course of the agency and in furtherance of it. . . .

"I instruct you . . . that it is the law that 'Whoever directly commits any act constituting an offense defined in any law of the United States or aids or abets or procures its commission is a principal'. [apparently referring to 18 U. S. C., § 550]

"The defendant has introduced evidence tending to show that he was not present at the time and place of the commission of the crime charged in this indictment. . . . If the evidence of an alibi in connection with all the other evidence raises a reasonable doubt of the presence of the defendant at the time and place of the crime he should be acquitted."

The jury acquitted petitioner on the possession and sales counts and convicted him on the nuisance count.

The court by the first quoted instruction, in harmony with the pleadings, authorized the conviction of petitioner upon the finding of the possession for sale of the six drinks without more. The familiar rules that the principal may be held for acts of his agent and that one who aids or procures the commission of crime is a principal applied equally to all the accusations and were not limited to the first count. The charge that if petitioner were absent he must be acquitted also applied on all counts. There is no ground to hold that the jury, notwithstanding petitioner's absence from the place when the prohibition agents were there, found him guilty of nuisance and that because of that absence it found him not guilty of the very act alleged to constitute the nuisance. The jury must have rejected his alibi. And, if petitioner through another kept for sale the liquor as charged in the first count, he necessarily acted through the same agent as to the identical possession alleged in the second.

The definition of nuisance in § 33 manifestly requires continuity of maintenance, that is a practice or course of business. Inherently it is a continuous offense having duration. Cf. *In re Snow*, 120 U. S. 274, 281. *Blockburger* v. *United States*, — U. S. —. This is confirmed by § 34 which authorizes temporary and permanent injunctions for the abatement of such nuisances. But to hold that unlawful possession or a single sale without more con-

stitutes a nuisance as defined "would be to render meaningless the other provisions of the law in which the Congress has denounced these specific acts, and provided punishment for their violation". *Barker* v. *United States,* 289 Fed. 249, 250. A single sale, if attended by circumstances warranting the inference that the defendant is engaged in a practice of which the sale is but an instance, may be sufficient to establish the offense. But mere possession for sale in a building of a half-dozen drinks does not measure up to the standard. *Lewinsohn* v. *United States,* 278 Fed. 421, 425. *Reynolds* v. *United States,* 282 Fed. 256, 258. *Singer* v. *United States,* 288 Fed. 695, 696. *Miller* v. *United States,* 300 Fed. 529, 537. *United States* v. *Ward,* 6 F. (2d) 182. *Schechter* v. *United States,* 7 F. (2d) 881. *Fisher* v. *United States,* 32 F. (2d) 602, 604.

The facts alleged in the first count are not sufficient to constitute nuisance. They amount only to a charge of unlawful possession. The count contains nothing as to the character of the place. No practice or course of business maintained or intended is alleged. The facts set forth are not distinguishable from those alleged as constituting the unlawful possession charged in the second count. It is of no legal significance that the pleader cited § 33 in the first count and § 12 in the others and referred to the offense as "nuisance" and failed to characterize or name those charged in the others. *Williams* v. *United States,* 168 U. S. 382, 389. *Hammer* v. *United States,* 271 U. S. 620, 625. *People* v. *Aro,* 6 Cal. 207. *State* v. *Murray,* 41 Ia. 580.

By finding petitioner not guilty under the second and third counts the jury conclusively established that the evidence was not sufficient to prove the unlawful possession or sale there alleged. Since the first count charged nothing more than unlawful possession, this amounted to contradictory findings on the same fact. But even if that count charged a nuisance, the unlawful keeping of that liquor for sale was essential to the offense, in fact the corpus delicti, and the verdict of guilty necessarily included a finding of the very possession that was conclusively negatived by the verdict under the second count. If the finding of guilt on the first count were not contradicted by another finding contained in the same verdict or if it stood alone, a judgment would properly be entered thereon convicting petitioner of the unlawful poss-

ession. 18 U. S. C., § 565. *Samlin* v. *United States,* 278 Fed. 170. *Sparf and Hansen* v. *United States,* 156 U. S. 51, 62. *Wallace* v. *United States,* 162 U. S. 466, 476.

This is not a failure of the jury to pass on all the counts submitted to them as in *Selvester* v. *United States,* 170 U. S. 262, and *Latham* v. *The Queen,* 5 B. & S. 635, cited in the opinion here. In this case the jury responded to all the issues, but the findings cannot be reconciled. Possession was alleged in the second count and negatived by the jury. Nothing remains to support the opposite finding under the first count. The repugnancy is such that if the first is accepted the second must be rejected. I am of opinion that this record plainly requires an express and unqualified decision that these findings conflict and are completely repugnant.

What is the legal effect of such conflict in the verdict?

Where the jury's action reflects mere inconsistency in the consideration of the evidence which results in apparently illogical or unreasonable conclusions, courts will disregard differences and give effect to the verdict.*

In civil cases where there is conflict between a special and general verdict the former will prevail. *Lemke* v. *Chicago, Milwaukee & St. Paul Railway Company,* 39 Wis. 449. If here the first count stated facts which taken with the specified possession of six drinks would be sufficient to constitute nuisance, the finding of not guilty on the possession count would be in principle and effect a special finding negativing that element of the offense charged. Cf. *People* v. *Piper,* 50 Mich. 390. In a civil case, if the inconsistency is between findings in a special verdict in respect of a controlling fact no judgment can be entered. As said by Chief Justice Ryan: "The verdict on a material point finds for each

*Dimmick *v.* United States, 121 Fed. 638, 642. Boone v. United States, 257 Fed. 963, 968. American Socialist Society *v.* United States, 266 Fed. 212, 214. Bullock *v.* United States, 289 Fed. 29, 32. Carrignan *v.* United States, 290 Fed. 189, 190. Lee Choy *v.* United States, 293 Fed. 582, 584. Dallas *v.* United States, 4 F. (2d) 201, 202. Heese *v.* United States, 28 F. (2d) 770. United States *v.* Anderson, 31 F. (2d) 436. Pankratz Lumber Co. *v.* United States, 50 F. (2d) 174. Thompson *v.* State, 177 Ark. 1, 10. People *v.* Edwards, 72 Cal. App. 102, 117. Holt *v.* People, — Colo. —, 1 P. (2d) 921, 922. Rokvic *v.* State, 194 Ind. 450. State *v.* Brizendine, 114 Kan. 699, 703. Lanasa *v.* State, 109 Md. 602, 609. State *v.* Daly, 77 Mont. 387, 391. Weinecke *v.* State, 34 Neb. 14, 23. People *v.* Haupt, 247 N. Y. 369, 371. State *v.* Brown, 198 N. C. 41.

party, and against each party; being, in effect, equivalent to disagreement of the jury. The answer assumes to cut a single and indivisible truth in two. . . . No judgment can rest on such a verdict, and no court should receive it." *Carroll* v. *Bohan*, 43 Wis. 218, 220. *Hawes* v. *Chicago & Northwestern Railway Company*, 41 Wis. 44, 51. *Davis* v. *Town of Farmington*, 42 Wis. 425, 431. *Insurance Co.* v. *Smelker*, 38 Kan. 285. Under the common law a jury may give a special verdict in a criminal case. 2 Hawkins P. C., 8th ed., c. 47, § 3. 4 Blackstone, pp. 360-361. *Commonwealth* v. *Call*, 21 Pick. 509, 514. *Commonwealth* v. *Eichelberger*, 119 Pa. St. 254, 263. *State* v. *Bray*, 98 N. C. 480. *People* v. *Piper, supra.* No judgment may be entered upon an uncertain special verdict. *People* v. *Olcott*, 2 Johns. 301, 311.

In criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction. 2 Bishop, New Criminal Procedure, 2d ed., § 1015a (5).

Where one by different counts is accused of two crimes which by reason of their nature cannot be committed by the same person, a verdict of guilty on both counts will be held so inconsistent with itself and so uncertain in law that no judgment can be entered thereon. Such verdicts are so meaningless as to be without force. *Regina* v. *Evans*, 7 Cox C. C. 151, 157. *Rosenthal* v. *United States*, 276 Fed. 714. *Commonwealth* v. *Haskins*, 128 Mass. 60. *Tobin* v. *The People*, 104 Ill. 565. And see *Commonwealth* v. *Lowrey*, 158 Mass. 18, 20.

In *Regina* v. *Evans, supra,* one count accused the prisoner of stealing sheep. Another count charged him with having received them on the same day. There was a verdict amounting to a finding of guilty on each count. The Court of Queen's Bench held it inconsistent. The chief justice announcing the judgment said (p. 157): "This record must therefore be dealt with as if there had been a special verdict, on which the court should find matter which would not justify either an acquittal or conviction. The practice in such a case has been to award a *venire de novo*. The cases in Lord Raymond's reports, and the later cases, sanction such a course, and we cannot see any good grounds for distinguishing an uncertain general verdict, such as this, from an uncertain special verdict".

In *Rosenthal* v. *United States, supra,* three were indicted under the Act of February 13, 1913, 37 Stat. 670. One count accused them

of having bought and received property that had been stolen from a car, then being a shipment in interstate commerce, knowing it to have been so stolen. The second count charged that at the same time and place they had that property in their possession under like circumstances and with like knowledge.

On the first count the jury found all not guilty. On the other count all were acquitted but one and he was found guilty. The evidence showed that the property had been stolen and disclosed only one transaction between the thieves and the defendant who was found guilty. The court said (p. 715): "By its verdict upon the first count of the indictment the jury found that the plaintiff in error neither bought nor received the cigarettes from them [the thieves] with knowledge of the theft, and by its verdict upon the second count that the plaintiff in error was at the same time and place in possession of the property with such guilty knowledge. The two findings were thus wholly inconsistent and conflicting. For this reason we feel obliged to reverse the judgment and remand the case for a new trial."

Upon the indictment of several for an offense that could not be committed without the participation of two or more of them a verdict of guilty against one and of not guilty for the others is deemed wholly repugnant and invalid. 1 Chitty, Criminal Law, 5th Am. ed., p. 640. On indictment of riot against three a verdict finding less than that number guilty is void for more than two must riot. *Harison* v. *Errington*, Popham (2d. ed.) 202. *Rex* v. *Heaps*, 2 Salk. 593. *The King* v. *Sudbury*, 12 Mod. 262. *Rex* v. *Scott*, 3 Burr. 1262, 1264. And on a charge of conspiracy against two, a verdict convicting only one is void. *United States* v. *Hamilton*, 26 Fed. Cas., pp. 90, 91. *Feder* v. *United States*, 257 Fed. 694, 696. *People* v. *Olcott*, *supra*, 310-311. *Queen* v. *Manning*, 12 Q. B. D. 241, 245. *Queen* v. *Thompson*, 16 A. & E. 832, 844 *et seq.* And on the trial together of persons accused as principal and accessory, acquittal of the former renders a verdict against the latter bad because entirely inconsistent with the innocence of the person charged as the principal offender. 2 Coke's Inst. 184. Foster, p. 360. 1 Hale P. C. (1st. Am. ed.), p. 625. 2 Hawkins P. C., c. 29, § 47. *United States* v. *Crane*, 4 McLean 317, 319. *Commonwealth* v. *Andrews*, 3 Mass. 126, 131.

One accused in different counts of an indictment of the same crime, there being no difference in the means alleged to have been employed, may not be adjudged guilty on a verdict of conviction on one count and of acquittal on the other. *Speiller* v. *United States,* 31 F. (2d) 682, 684. *State* v. *Akers,* 278 Mo. 368, 370. *State* v. *Headrick,* 179 Mo. 300, 307. Cf. *Commonwealth* v. *Edds,* 14 Gray 406, 410. *United States* v. *Malone,* 9 Fed. 897, 900.

Where there is a verdict of not guilty on one count and a verdict of guilt on another and the former necessarily determines that the evidence failed to establish a fact which is an essential ingredient of the offense charged in the other count, then in determining whether the evidence was sufficient to sustain the finding of guilt the court must exclude from consideration the fact so found in favor of the accused. And so in every such case the question of law for the court always is whether, outside the fact eliminated by the verdict of not guilty, the evidence was sufficient to warrant the conviction. *Hohenadel Brewing Co.* v. *United States,* 295 Fed. 489. *Peru* v. *United States,* 4 F. (2d) 881. *Murphy* v. *United States,* 18 F. (2d) 509. *Boyle* v. *United States,* 22 F. (2d) 547. *Kuck* v. *State,* 149 Ga. 191, 193. And see *Baldini* v. *United States,* 286 Fed. 133.

Under an indictment by one count accusing eight persons of conspiracy to maintain a nuisance and alleging as an overt act the maintenance of that nuisance and by another charging that they did knowingly maintain such nuisance, a verdict acquitting them of the conspiracy (i. e., the agreement to maintain) and convicting them of having knowingly maintained the identical nuisance specified in the conspiracy charge will not support a judgment of guilt. This for the reason that, by the verdict that all knowingly maintained the nuisance, the jury necessarily found that there was an agreement among them to maintain the nuisance. The court said: "It is unthinkable that eight men should for a period of time have knowingly maintained and operated the place where intoxicating liquor was sold and kept for sale, without some kind of an agreement among themselves". *Boyle* v. *United States, supra,* 548.

One indicted for violation of the National Prohibition Act was accused by the first count of unlawful manufacture at divers times between dates more than a year apart. By the five counts

following they were accused of unlawful sales at different times; and, by the seventh count they were accused of nuisance during that period in that they maintained a place where liquor was manufactured, kept and bartered. The jury found defendant not guilty under the first six counts, and guilty of nuisance under the seventh. The court held the facts alleged in the counts on which defendant was acquitted were to be deemed as non-existent and excluded from consideration in determining whether there was evidence to sustain the nuisance charged. Finding no evidence outside the facts so negatived, the court held conviction could not be sustained. *Hohenadel Brewing Co.* v. *United States, supra.*

The Government cites *Carrignan* v. *United States,* 290 Fed. 189; *Marshallo* v. *United States,* 298 Fed. 74; *Steckler* v. *United States,* 7 F. (2d) 59; and *Gozner* v. *United States,* 9 F. (2d) 603. And see *Seiden* v. *United States,* 16 F. (2d) 197.

In the *Carrignan* case defendant was accused in two counts of violation of liquor laws; the first count charged unlawful sale and the second maintenance of a nuisance. The opinion does not disclose details alleged. The jury acquitted on the sale charge and convicted of nuisance. The court distinguished the *Rosenthal* case, *supra,* and said (p. 190): "In the present case, plaintiff in error could have been convicted and sentenced upon both counts of the indictment. He could have been found guilty of either offense without having been guilty of the other." And it supported that statement by reference to the evidence. It is to be inferred from the opinion that the allegations in the nuisance count were not, as they are here, limited to the liquor bought by the government agent. No repugnancy as a matter of law was found or dealt with in the opinion, and there is nothing in recognition or support of the principle here contended for by the Government.

In the *Marshallo* case the indictment was in two counts for violation of liquor laws; the first was for nuisance and the second for unlawful possession. The opinion does not show details alleged. Marshallo was shown to be owner and proprietor of the place. Government employees testified: The place was a soft drink parlor having a lunch bar and back room, two witnesses went into the back room and ordered three drinks. Marshallo was behind the bar, bottles of liquor were passed from the cellar through a hole in the floor, three drinks were handed to the waiter, payment was made and rung up on a cash register. Immediate

examination of the cellar disclosed a large quantity of liquor kept there. The jury found Marshallo guilty of nuisance, not guilty of possession. He insisted that the verdict of guilt of nuisance could not stand because inconsistent with the acquittal of possession. The court held there was ample evidence of nuisance and sustained the verdict citing the *Carrignan* case. The opinion does not suggest that, outside the possession so specifically found not proved, there was not ample evidence to establish defendant guilty of nuisance. The opinion shows no such conflict or repugnancy that if one finding were true the other necessarily must be false.

In the *Steckler* case—which the opinion of this court cites—a druggist with a permit to possess liquor for sale under prescribed regulations was indicted for violation of liquor laws in four counts; the first charged nuisance—the maintenance of a place where liquor was kept for sale in violation of the Act—the second unlawful possession, the third an unlawful sale on April 8, the fourth another unlawful sale on that day. The jury found him guilty of unlawful possession and acquitted him on the other counts. The court held *Marshallo* v. *United States,* controlling and—it need not be considered whether justifiably—dealt with the case as if there were an irreconcilable conflict. It said (p. 60): "No doubt it has generally been assumed that, if a verdict was rationally inconsistent, the conviction ought not to stand, and probably that was the common law, though it is hard to find a case squarely so holding". It concluded that the acquittal on the nuisance and sales counts was an "assumption of power which they [the jury] had no right to exercise but to which they were disposed through lenity", and so sustained the conviction.

In the *Gozner* case, the indictment charged violation of the liquor laws; the first count charged unlawful possession, the second unlawful possession of property for use in the manufacture of intoxicating liquor, the third manufacture and the fourth the maintenance of a nuisance. Gozner was acquitted on the first three and convicted of nuisance. The court held the findings of not guilty on the three counts did not have the force of res adjudicata precluding conviction on the other count. But it was not held or suggested that, excluding the facts necessarily found not proved under the first three counts, there was not evidence to warrant conviction of defendant for the maintenance of the nuisance. The

reasoning of the court does not apply in this case. One of the judges in a dissenting opinion insisted that there was a legal inconsistency between the findings of not guilty in favor of Gozner on the three counts and his conviction on the fourth and maintained that, outside the facts necessarily negatived by the acquittals, there was no evidence to convict of nuisance.

I am of opinion that the authorities establish as well-settled: (1) that when, upon an indictment charging the same offense in different counts, the jury acquits as to one and convicts on the other defendant is entitled to a new trial; and (2) that, when different crimes are charged in separate counts and the jury acquits as to one and convicts on the other, the conviction will be sustained unless, excluding the facts which the jury in reaching its verdict of acquittal necessarily found not proved, it must be held as a matter of law that there is not sufficient evidence to warrant the verdict of guilty; and, where the evidence outside the facts so conclusively negatived by the acquittal on one count is not sufficient to sustain guilt on the other count, defendant is entitled to a new trial.

The rule first stated is applicable here. Excluding the possession negatived by the finding under the second count, there is nothing of substance left in the first count for its specifications were limited to the keeping for sale of the identical drinks alleged in the second count to have been unlawfully possessed. Moreover, even if it be thought that nuisance was sufficiently alleged in the first count, the unlawful possession of the six drinks was an essential ingredient of the offense alleged. The evidence having been found insufficient to establish such possession, it cannot be held adequate to warrant conviction under the first count. The finding of not guilty is a final determination that possession, the gravamen of both counts, was not proved.

The law does not permit investigations into the deliberations of juries for ascertainment as a matter of fact upon what considerations verdicts are reached; the soundness of that rule has never been questioned. There are stronger reasons against speculating whether, or assuming that, the jury through tenderness of disposition, mercy or forbearance acquitted while knowing that its duty was to convict the accused. Conflict between the findings

may not be explained. The inference that the jury, seeking rightly to discharge its duty, made a mistake is to be preferred over the suggestion that it found for defendant upon an assumption of power it may not lawfully exert.

I am of opinion that the verdict does not support the judgment.